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ON TRACING

BY K. V. KRISHNASWAMI AIYAR.

In equity, if one person held in a fiduciary capacity, goods or chattels belonging to another, that other could not only recover back the identical goods or chattels at any time, if they should be in existence, but could also follow the same into any transformations they might have undergone and seize such transformed things. But this was subject to the rule that if the trustee (used in a wide sense) had disposed of the goods and chattels and recovered their value in money, there was an end to the right of the beneficiary. The money became part of the general assets of the trustee, no longer available to the beneficiary. Thus where a factor to whom a merchant had consigned goods for sale, sold the goods, recovered the price and died with debts of a higher nature, the money became part of the general assets. But if the factor re-invested the price in other goods, those other goods were available to the merchant. The exception to the rule of following, in the case of money, was founded on the principle that money had no earmark. This was decided as early as 1710 in *Whitecomb* v. *Jacob*[1] and in *Scott* v. *Surman*.[2]

The next stage was to consider whether money if invested in land, could be followed. Some cases declined to give relief because money had no earmark, *e.g.*, *Deg* v. *Deg*.[3] But others did give relief, and the positions to be answered therein were:—

(1) Whether in view of the Statute of Frauds which prohibited creation of trusts by parol, a trust in respect of land could be declared by the court without an instrument in writing as required by the Statute, and

(2) The question of the proof of the investment.

1. (1710) 1 Salk. 160: 91 E. R. 149.
2. (1742) Willes 400: 125 E. R. 1235-1237.
3. (1727) 2 P. Wms. 412: 24 E. R. 791.

The former question was answered by the argument that if the consideration for the investment was shown to have flowed from other funds than those of the person in whose name the land stood, that fact could be proved, with the consequence that there was a resulting trust which avoided the Statute of Frauds. This was the problem solved in *Lane* v. *Deighton*[4] and in *Lench* v. *Lench.*[5] Sir William Grant M. R. in the latter case said: "Whatever doubts might have been formerly entertained on the subject, it is now settled that money may be followed into the land."

Then we come to the important case of *Taylor* v. *Plumer.*[6] There a broker who was entrusted with money to buy Exchequer Bills, purchased American stock and bullion with the money, with intent to abscond therewith, but being taken before quitting England, he surrendered the securities and bullion. On the same day the broker became bankrupt, and the question was whether the principal was entitled to the American stock and bullion or whether they formed part of the general assets. The argument for the Assignee in Bankruptcy shows that the point taken on his behalf was that the right to follow existed only in cases where the transformation of the trust property was in pursuance of the trust, provided of course that such property is capable of being ascertained. The distinction was taken that where the property had been tortiously acquired by the agent in fraud of the trust, there the lien of the principal was at an end, and it was said "that the principal cannot for his own private advantage and to the prejudice of all the other creditors aver what has been done in fraud of his trust, to have been done in execution of it." (Cf. *Waite* v. *Whorwood.*[7]) The reason for thus limiting the rule was stated in the form that as the principal would not be bound to take the property if purchased by the agent in violation of the trust, so it is only so long as he is bound to accept it, that he can reasonably call it his own. Thus while the right to follow and trace was well understood to be dependent on "title", it was thought that such title could not be averred where there was a breach of trust. The argument *contra* relied on the cases of *Whitecomb* v. *Jacob*[1] and *Lane* v. *Deighton*[4] and the distinction was stated to be, not whether the property in the hands of the factor was acquired in pursuance of the trust or not, but whether it can be specifically distinguished

1. (1710) 1 Salk. 160: 91 E. R. 149.
4. (1762) Amb. 409: 27 E. R. 274
5. (1805) 10 Ves. Jun. 516: 32 E. R. 945.
6. (1815) 3 M. & S. 562: 105 E. R. 721.
7. (1741) 2 Atk. 159: 26 E. R. 500.

and ascertained to belong to the principal, and not to the bankrupt, that the reason why money cannot be followed was, in this sense, not because it had no earmark, but because, on account of the currency of it, it cannot be recovered after it had so passed into currency, and that as regards tortious acquisitions it was always open to the beneficiary to waive the wrong and treat the other as receiver for his own use. Lord Ellenborough C.J. put down the test as the capacity of being identified and distinguished from all other property. He added that an abuse of trust can confer no rights on the party abusing it nor on those claiming in priority with him; that the product or substitute of the original thing still followed the nature of the thing itself so long as it can be ascertained to be such, and the right only ceases when the means of ascertainment failed, which is the case when the subject is turned into money and is mixed and confounded in a general mass of the same description; that the question was one of fact and not of law; and the dictum that money had no earmark must be understood in the same way, *i.e.*, as predicated only of an undivided and undistinguishable mass of current money. The right to follow did not depend upon the question whether the transformation was in pursuance of the trust and not in breach of it, but whether it could be shown "that they are so, where the thing can be discovered."

This principle of identity even in regard to money, without reference to the doctrine stated in general terms that money has no earmark, is explained by a citation from the judgment of Burnett J. in *Ryall* v. *Rolle*,[8] where in referring to *Whitecomb* v. *Jacob*[1] the learned Judge said: "Suppose goods are consigned to a factor who sells them, and breaks, the merchant for the money must come in as a creditor under the commission. . . . Suppose, instead of selling the goods for ready money, he sells for money payable at a future day, and breaks before the day, if the assignees receive the money, it will be for the use of the merchant. Or suppose that the factor had taken notes for the goods, if his assignees receive the money upon these notes, it will be to the merchant's use. This was determined in *Salmon* v. *Scott*.[9]" The sole principle in "following" is that "he has repossessed himself of that of which . . . he never ceased to be the lawful proprietor." To the same effect is the case of Ex parte *Dumas*[10] where the Lord Chancellor Lord Hardwicke gave an order for tracing only in respect of the bills that remained *in*

1. (1710) 1 Salk. 160: 91 E. R. 149.
8. (1749) 1 Atk. 172: 26 E. R. 112.
9. (1742) Hil. 16 G. 2.
10. (1754) 1 Atk. 232: 26 E. R. 149.

specie and refused it in respect of those collected and mixed with the general assets.

At this point again, in regard to the true limits of following money, it may be useful to refer to the case of *Chedworth* v. *Edwards*,[11] where Lord Chancellor Lord Eldon, in a case where an injunction was asked for against a steward, restraining dealing with stocks and money at bankers, proved by evidence to be the produce of his master's property, in granting injunction in respect of stocks refused it in respect of the money at the bank and stated that the last payment was made about two years ago and it was too much to infer that it was the same money unconverted.

Thus the right to follow whether goods and chattels or money depends solely upon the proof of identity as a question of fact, and it ends "where the means of ascertainment fail". It is founded upon title, the right to the thing, not upon the question whether the transformation is in pursuance of the trust or against it as a breach thereof, but whether the beneficiary can point his finger to the thing and say "it is mine". In cases in which the rights of third parties do not intervene and the "following" is against the trustee, it matters not whether the transaction was in pursuance of the trust or in breach of it; for in the latter case it is open to the beneficiary to waive the tort, confirm the act and claim it as trust property. But where the property has passed into the hands of a third person the question whether the act of the trustee is in pursuance of the trust or in breach of it has a material bearing. If it is in pursuance of the trust the title to the thing passes to the third person and the beneficiary cannot any longer claim that thing as his. He will only be entitled to the proceeds of such transformation in substitution of the trust property. But where the act is a breach of trust it is open to the beneficiary to aver the breach itself, deny the passing of title to the third party, put forward his own consequent title to that property in the third party's hands and follow it. Herein comes the relevancy of averring a breach of trust. The breach of trust is not the foundation of the claim, the claim is founded on the title, which the breach of trust shows still inheres in the beneficiary. This is what is alluded to by Jessel M.R. and Thesiger L.J. in In re *Hallett's Estate*.[12]

The next case is that of *Pennell* v. *Deffell*.[13] It is always cited as the leading case on the subject. This case deserves close

11. (1802) 8 Ves. Jun. 47: 32 E. R 268.
12. (1880) 13 Ch. D. 696 at 709 and 723.
13. (1853) 4 De G. M. & G. 372: 43 E. R. 551.

scrutiny for the reason that more is sought to be deduced from it than the learned Judges ever decided. On the facts of the case, it was by no means a startling decision, though the Court overruled the conclusion arrived at by the Master of the Rolls. The decision itself is merely a simple illustration of the application of the principle that money has no earmark; in the sense that it is not traceable where it has passed into currency, with the consequential exception that where it could be shown to exist in a mixed mass, even money could be traced. In that case, one Mr. Green was an Official Assignee in Bankruptcy. He received moneys of bankrupts' estates and put them in an account in his own name in the bank. On his death, there was a contest as between his successor in office, Mr. Pennell, and the administrator of his estate. Inquiries were directed as to the extent to which the moneys in the bank represented trust moneys or private moneys of Mr. Green. The Master of the Rolls, who heard exceptions to the Master's Report, took the view that the entire amount in the bank should go to the administrator, upon the ground of the supposed impossibility of ascertaining what portion of the balance at the bank belonged to the trust. There was no question that if it could be ascertained, the trust would attach to it. But the question was if it could be ascertained, the position that the subject-matter of the trust must in some manner be ascertained being the basis. On appeal from the Master of the Rolls, the Court held that the trust moneys stood well ascertained in the mixed moneys in the bank, which Mr. Pennell on behalf of the bankrupts' estates could follow. That was all. Mr. Green instead of putting trust moneys into a box, put it into the bank, and added some more of his private moneys to it. If Mr. Green got an equivalent amount in cash from the bank, cannot the bankrupts' estates lay hands on that sum for their quota? Put in this form, the answer is obvious; and that was the decision in the case. Knight Bruce L. J. says: "When a trustee pays trust moneys into a bank to his credit the account being a simple account with himself, not marked or distinguished in any other manner, the debt thus constituted from the bank to him is one which, as long as it remains due, belongs specifically to the trust as such and as effectually as the money so paid would have done, had it specifically been placed by the trustee in a particular repository and so remained: that is to say, if the specific debt shall be claimed on behalf of the *cestuis que trustent,* it must be deemed specifically theirs, as between the trustee and his executors and the general creditors after his death on one hand and the trust on the other."

It is to this same conclusion that Turner L.J. comes, but by different analogical reasoning. He begins by stating that all trust property, however much it may be changed or altered in its nature or character, and all the fruits of such property whether in its original or altered state, continue to be subject to or affected by the trust, and assures us that the Master of the Rolls did not in any degree dissent from that principle. What does this mean? The Master of the Rolls thought that being money, not kept apart, but mixed with other moneys, it necessarily lost its identity and became impossible of identification. The learned Judge points out that that is not correct and states that it is a question of fact whether it could be identified. If it could be, the right exists. Then the learned Judge proceeds to illustrate the position, but unfortunately takes up a complicated illustration which has led to much misunderstanding. It is clear that he did not intend to convey more than what the illustration of the repository and chest of Knight Bruce L.J. conveyed, with the addition of the trust money earning fruits in the meantime, nor was there any occasion or necessity to carry the principle of law beyond what that illustration would carry it to. He takes the illustration of the continuance of a partnership after the death of one of the partners with the concurrence of the executor and the right of the beneficiary to share in the ultimate general assets. This illustration is understood as if it stated that where a trustee in breach of trust merely puts in money in a business, but not as capital, the general assets are traceable for the invested amount. The learned Judge, however, laid down no such proposition. It was not the case of any sum being put into business and getting mingled with the assets. But it was a case of a continuance in business of the original ramified assets which constituted the capital, so that they got into further ramifications. It was simply a case of a few changes in the original form growing into more and further changes. This is brought out by the learned Judge himself when he says that the capital itself consisted only of the stock-in-trade; and if we conceive that in each such item of the stock-in-trade, the beneficiary had, upon the death of the ancestor and at the moment of the continuance of the business by the executor, a share which could be identified, when each such item further got transformed the same identity persists in the transformed material. And as the beneficiary had an identifiable interest in each item of the assets, if we realise that the ultimate assets are only each of these assets further metamorphosed, that identifiable interest of the beneficiary is identifiable in and is traced in fact to such ultimate assets. The

distinction is that it is not the case of a sum of money distinct from the existing assets, that is put into the business, but the beneficiary's share in each of the existing assets. The learned Judge cites it as an illustration of the subsistence of continued identity, not as a case where the right to trace results when there is a break in continued identity. He emphasises the necessity for ascertainment of the subject-matter of the trust, and refers to the decision of the Master of the Rolls, as based on the supposed impossibility of ascertainment, and says, "Here is an illustration where the ascertainment is possible," and proceeds to state that there is "a continuous substratum," *viz.*, the ascertained amount of the deceased partner's share. The learned Judge cannot by any means be understood as having extended the doctrine beyond what has been laid down by Burnett J. in *Ryall* v. *Rolle*[8] on the authority of *Whitecomb* v. *Jacob*,[1] where the learned Judge said, "Suppose goods were consigned to a factor who sells them and breaks, the merchant for the money must come in as a creditor under the commission," which was understood by Lee C. J. in the same case, as enunciating the position that things arising from the sale of other things follow the nature of the goods themselves only when the thing can be discovered. Nor can Turner L.J. be understood as giving a right to trace beyond the extent resulting from the illustration of the chest, or to give it in a case in which Lord Eldon refused to grant an injunction on the ground that the money which was put into the bank two years before, may not be identifiably there.

In fact, though the learned Judge had taken up the illustration of a partnership and sought to establish the analogy between the case before him and his illustration by stating that there was the substratum of the partner's share in the latter case which corresponded to the amount of trust moneys put into the banking business in the former—he does not seem to feel satisfied that the illustration he had taken was an apt one. He says: "It may be said that in the case to which I have referred there are rules and principles by which this Court is guided in determining what belongs to the estates of deceased partners . . . But before we part with the question upon that ground . .," and so saying the learned Judge begins to take up other familiar illustrations.

1. (1710) 1 Salk. 160 · 91 E. R. 149.
8. (1749) 1 Atk. 172 : 26 E. R. 112.

Now the case of *The Lord Provost etc. of Edinburgh* v. *Lord Advocate*[14] justifies the mental reservation that Turner L.J. had in citing the illustration he took as an apt or perfect one or as founded upon principles identical with those which should govern the decision in *Pennell* v. *Deffell.*[13] In that case, trustees of two independent trust funds, the Trinity Hospital and the Alexander Trust, mixed them together and dealt with the mixed mass as a single fund. They purchased estates therewith, which rose in value, and invested in bonds which depreciated. The conflict was between the two trusts, the Trinity Hospital claiming the profitable estate and seeking to allocate the losing investment in bonds to the Alexander Trust. The ultimate decision was that the profit and loss should be pooled together and the two estates should share *pro rata,* dependent on the proportions of their original capital funds which had been administered as a mixed fund. If there were no other facts, subject to such observations as one might make upon the breach of trust in mixing the funds together—which however was done *bona fide* —the most just way to deal with the question was to divide as the House of Lords divided. But the possibility of raising an argument in favour of the Trinity Hospital as against the Alexander Trust, arose by reason of the fact that the treasurer of the trusts in deliberate disobedience of the instructions of the trustees, paid for the purchase from the funds of the Trinity Hospital so identifiable at that time.

In dealing with this question, Lord Hatherley takes up the same illustration as Turner L.J. did in *Pennell* v. *Deffell*[13] and a consideration of Lord Hatherley's judgment will show the value and relevancy of that illustration. The illustration is strictly relevant to a case like the one before the House, of a competition between two different estates seeking distribution between themselves of the proceeds of a particular investment, rather than to the one which actually arose for decision in *Pennell* v. *Deffell.*[13] Lord Blackburn himself adverts to this when he says: "No doubt when the question has been whether those who represented the trust could claim property on the ground that it was procured by trust funds which they had a right to follow, the identity of the fund is all important. But such a case as the present as to an investment has never, that I can find, been raised. In *Pennell* v. *Deffell*[13] it might have been raised, but those entitled to the different estates . . . .

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13. (1853) 4 De G. M. & G. 372: 43 E. R. 551.

14. (1879) 4 A. C. 823.

very sensibly settled the proportions . . . without going to law about it." Thus Lord Blackburn differentiates between the case of tracing, for which continued identity is all-important, and a case of a joint title to a common investment which was the case before the House, as distinguished from the point for decision in *Pennell* v. *Deffell.*[13] Now, if we find that for the decision of the case before the House, Lord Hatherley took up the same illustration as that which Turner L.J. took in *Pennell* v. *Deffell,*[13] it is obvious that the fears entertained by Turner L.J. later in his own judgment about the aptness of the illustration he took and whether that may not be governed by other rules and principles, cannot be said to be ill-grounded. On page 839 in *Lord Provost etc. of Edinburgh* v. *Lord Advocate*[14] Lord Hatherley, after discussing the history of the difficulties raised in determining the rights consequent upon the utilisation of a deceased partner's share in a continuing business, says: "The principle was that the trust money having been used in the partnership concern and profits having resulted from that use of trust money, no attempt should be made to separate all the different funds out of which the money might have been paid, but the share of profits on the trust money so used was to be ascertained according to the capital employed." Is this not a definite statement that the right of the *cestui que trust* to a share of the ultimate assets is not founded upon any principle of tracing, but upon other principles peculiar to the law of partnership, which Turner L.J. himself suspected might well be?

So much about the decision in *Pennell* v. *Deffell.*[13] But two observations made in the course of the judgment, not covered, however, by the point decided, throw light on the principles of tracing beyond those actually established by the decision. Both the learned Judges point to the fact that the case before them was not complicated by any question of "order and disposition" or reputed ownership; and it was also stated by Knight Bruce L. J. "Whether the deposit in a bank by Mr. Green is a breach of trust, is a different question."

As regards the first observation, the suggestion seems to be that if Mr. Green had become bankrupt, different considerations might have arisen dependent on the question of reputed ownership. If Mr. Green could deal with the money as his own, being himself merely in debt to the trust estates, the trust estates would only be creditor against Mr. Green and have no

13. (1853) 4 De G. M. & G. 372: 43 E. R. 551.
14. (1879) 4 A. C. 823.

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claim for a charge on the bank balance. Subsisting identity will not avail.

As regards the second observation, it would have relevancy only on the supposition of the bankruptcy of the bank. In that event, if the investment by Mr. Green were authorised, the trust estates would be bound to reduce their own claim to the extent of the dividend received. On the other hand, if the investment by Mr. Green into the bank was a breach of trust it would be open to the trust estates to waive the breach and take the fund in the bank (if the latter were solvent) or in the alternative to aver the breach, disclaim the fund in the bank, and proceed for conversion against Mr. Green.

The next case of importance is *Frith* v. *Cartland*.[15] It is significant to note how Sir Page Wood, Vice-Chancellor, understood the limitations of the decision in *Pennell* v. *Deffell*.[13] The Vice-Chancellor begins his judgment by saying: "*Pennell* v. *Deffell*[13] is a very instructive case . . . It does not indeed lay down any new principle, but it contains a particularly clear and able enunciation of established doctrines . . . The guiding principle is that a trustee cannot assert a title of his own to the trust property. If he destroys a fund by dissipating it altogether, there remains nothing to be the subject of a trust. But so long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust. A second principle is that if a man mixed trust funds with his own the whole will be treated as trust property except so far as he may be able to distinguish what is his own . . . The sole question in every case is whether the property can or cannot be identified." The statement of the law in this form is conclusive to get rid of the notion that proof of an initial blending is all that is necessary to enable the *cestui que trust* to lay hold on the ultimate assets without proving the identity in the intermediate stages. The statement by Sir Page Wood that if the trustee dissipates the trust fund, there remains nothing to be the subject of a trust, gives the key to the interpretation. It follows as a corollary to the necessity of proof of continued identity, and conversely emphasises the rule that where the means of ascertainment stop tracing stops. This is further illustrated by Sir Page Wood, where in explaining the actual decision in *Pennell* v. *Deffell*[13] he says: "In *Pennell* v. *Deffell*[13] part of the trust fund had been paid into a bank, but it was not earmarked and was wiped out by subsequent drawings;

13. (1853) 4 De G. M. & G. 372: 43 E. R. 551.
15. (1865) 2 H. & M. 417: 71 E. R. 525.

and the whole ultimate balance—(which included moneys of Mr. Green's own, which he had put into the bank)—could not be fixed with the trust any more than a second £1,000 of stock which a trustee might happen to acquire after selling £1,000 of trust stock and spending the proceeds."

The next in the line of cases is Ex parte *Cooke,* In re *Strachan.*[16] The decision in this case merely follows that in *Taylor* v. *Plumer,*[6] and applies that decision to a case of money. In *Taylor* v. *Plumer*[6] the broker empowered to buy exchequer bills, purchased American stock and bullion with a view to abscond with them. The broker in Ex parte *Cooke,* who was directed by the trustee to sell consols and purchase railway stock, got the cash on sale, engaged for the purchase of railway stock for the settling day, but failed before that day. He had received the price by a cheque and had paid it into his account at the bankers. The trustee claimed so much of the balance at the bank as was attributable to the price of the consols.

Before the Registrar, who refused to make the order in the first instance, the argument turned on the question whether a stock broker was a trustee, and the conclusion was that he was a mere banker and no more. The Registrar distinguished the case of *Taylor* v. *Plumer*[6] on the ground that "the stock broker went away with actual property in his possession, which was the property of his client." The Court of Appeal reversed the decision of the Registrar. The argument before the Court of Appeal emphasised that the price of the consols was trust money and the broker had notice of it. James L. J. took the view that the trust proceeds could not be made the broker's own for him to deal with by any bargain between the trustee and him, that the loan, if at all, was a breach of trust, and the money could be followed into the broker's hands. He added that even if there had been no trust, *Taylor* v. *Plumer*[6] governed the case. Baggallay J. A., though he expressed himself impressed by the decision in *Taylor* v. *Plumer,*[6] relied upon the original trust character of the money, which it retained in the broker's bank account, and observed "if it can be traced, it can be followed. There may be difficulty in tracing it but that does not affect the principle." Bramwell J. A., concurring on the point of view that it was trust money in the bank, explained the distinction which the Registrar made of the case of *Taylor* v. *Plumer.*[6] He said that the American bonds in *Taylor* v. *Plumer*[6] were not the property of the client by reason of his having ordered them

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6. (1815) 3 M. & S. 562: 105 E. R. 721. 16. (1876) 4 Ch. D. 123.

to be purchased, but because they were purchased with his money, and that necessarily involved the conclusion that if the broker had been caught with the money upon him, the client could have claimed it, and that the broker occupied a fiduciary position. The learned Judge continued, "A difficulty in tracing money often arises from the circumstance that payments now are not usually made in gold, but by cheques which go into a banking account, so that the sum is mixed up with the other moneys of the customer . . . The use of cheques may make difficulties in tracing money, but that, so far as it can be traced, it may be claimed as the property of the client. . ."

This case thus reaffirms the proposition that money can be traced as much as chattels, and that the principle in both cases is the same, *viz.*, the title of the owner. The limits to tracing are also the same, *viz.*, identification; and the usual system of banking transactions may make tracing difficult, but that does not excuse the necessity to prove the identity. Another proposition is that if a valid bargain could be entered into between the trustee and the broker, so as to make the transaction one of loan to the broker, or if there were any other rules of trade or custom which enabled the broker to handle the money as if it were his own, there would be an end to tracing.

Next comes the case of In re *West of England and South Wales District Bank,* Ex parte *Dale and Co.*[17] After the apology for his observation in In re *West of England and South Wales District Bank,* Ex parte *Dale & Co.*[17] regarding *Pennell* v. *Deffell*[13] and its reconciliation with the earlier authorities, which Fry J. makes at the end of his judgment on page 703 upon Mrs. Cotterill's claim in In re *Hallett's Estate,*[12] this decision may not have much value. But the ground upon which Fry J. was evidently guided to his conclusion, and which Mr. Justice Vaughan Williams puts forward as justifying the judgment itself in his valuable book on Bankruptcy Practice, (*see* under S. 38), exemplifies one of the principles in the law of tracing. In In re *West of England and South Wales District Bank,* Ex parte *Dale and Co.,*[17] a banking company were employed by Dale & Co. as agents to collect money and remit. They received the cash, placed it with the other cash with them and informed the employer that the money had been remitted, but went into liquidation before actual remittance. Fry J. held that the money became part of the general assets not traceable at the instance of the employer. The argument on behalf of Dale & Co. was

12. (1880) 13 Ch. D. 696.
13. (1853) 4 De G. M. & G. 372: 43 E. R. 551. 17. (1879) 11 Ch. D. 772.

that the money was never in the order and disposition of the bank and that the mingling with the general assets was a breach of trust, which was denied by the liquidators. Fry J. traces the history of the law from *Whitecomb* v. *Jacob*,[1] and understood *Taylor* v. *Plumer*[6] as stating that money may be treated as earmarked when it is physically separated from other moneys. He felt that the law should be different from what he thought the cases established, then referred to *Pennell* v. *Deffell*,[13] understood it to enunciate correctly the change in the law, but felt bound by the continuity of precedent to the contrary, which according to him was against his following *Pennell* v. *Deffell*.[13]

In the first place Fry J.'s understanding of *Taylor* v. *Plumer*[6] and the antecedent authority is not correct as admitted by him later in In re *Hallett's Estate*.[12] The proposition that money had no earmark, while it was at first understood to predicate the impossibility of tracing in respect of money, was later understood only as referring to its condition when it passed into currency, but that even there it could be followed where it could be separated and identified, even in a bank account. So understood, *Pennell* v. *Deffell*[13] did not enunciate any change in the law and that is exactly what Sir Page Wood in *Frith* v. *Cartland*[15] stated in terms: "*Pennell* v. *Deffell*[13] is a very instructive case, upon all questions of this kind. It does not indeed lay down any new principle, but it contains a particularly clear and able enunciation of established doctrines and their bearing upon circumstances of some difficulty. The guiding principle is that a trustee cannot assert a title of his own to trust property. If he destroys a trust fund by dissipating it altogether, there remains nothing to be the subject of a trust. But so long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust. A second principle is that, if a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own." The justification, however, of Fry J.'s decision as pointed out by Justice Vaughan Williams is this: that the course of business was for the bank to place the actual moneys received with their own funds and remit the amounts by direction to a London bank who were common agents of themselves and their employers; the result of which was that the bank did nothing

1. (1710) 1 Salk 160: 91 E. R. 149.
6. (1815) 3 M. & S. 562: 105 E. R. 721 12 (1880) 13 Ch. D. 696 at 703.
13 (1853) 4 De G. M. & G 372: 43 E. R 551.
15. (1865) 2 H. & M. 417: 71 E. R. 525.

wrongful in mixing the moneys with their own. This would bring the case within the observations of James L.J. in Ex parte *Cooke,* In re *Strachan*[16] already referred to and those of Thesiger L.J. in In re *Hallett's Estate*[12] at the end of his judgment at page 723 *et seq.* In the words of Thesiger L. J. "Although there may have been a trust with reference to the disposition of the particular chattel which those moneys subsequently represented, there was no trust, no duty in reference to the moneys themselves, beyond the ordinary duty of a man to pay his debts." That Fry J. acted on the same assumption is clear from his own expressions in his judgment on the claim of Mrs. Cotterill in In re *Hallett's Estate,*[12] where referring to the authority to sell bonds given to an agent he speaks of it as an authority "which according to the proper interpretation to be put upon it by the course of dealing between them implied a right in him to mix the produce of the sale with his own moneys". He adds, referring to Ex parte *Dale & Co.*[17] that the factor properly converted the goods into money, that the money got properly mixed with his own money in accordance with the intention of the parties, and that in such a case the money could not be followed.

The case in In re *Hallett's Estate, Knatchbull* v. *Hallett, The claim of Mrs. Cotterill*[12] is a landmark in the history of the law of tracing. In that case a Mrs. Cotterill had some Russian bonds with Mr. Hallett, her solicitor, who was authorised to collect dividends thereon. Mr. Hallett "was bailee of the bonds and an agent to receive the dividend on the bonds". Mr. Hallett, before his death, improperly sold the bonds and put the money into his general account at the bankers. It was found as a fact that the money remained at his bankers mixed with his own money at the time of his death, *i.e.,* he had not drawn out that money from his banker. Thus, the proceeds of the Russian bonds stood identified with the funds in the bank. Upon these facts Mrs. Cotterill's claim was allowed by Fry J. and confirmed by the Court of Appeal. It is a significant fact that the trial judge was Fry J. who had decided Ex parte *Dale and Co.,*[17] but as stated already, he properly explained his position in coming to his conclusion in Ex parte *Dale and Co.*[17] Before the Court of Appeal, but for the observations of Fry J. in Ex parte *Dale and Co.*[17] there was not much point for discussion, and in view of Fry J.'s own statements in the matter under appeal, no further criticism of the judgment of Fry J.

12. (1880) 13 Ch. D. 696 at 707. 16. (1876) 4 Ch. D. 123.
17. (1879) 11 Ch. D. 772.

in Ex parte *Dale and Co.*[17] was called for. However, Jessel M.R. criticised Fry J.'s judgment *in extenso* and it is of value to us as a clear re-statement of the legal position. Jessel M.R. points out that in the early case of *Whitecomb* v. *Jacob*[1] and the early cases that followed it, the rule of equity was understood to be inflexible that money had no earmark. It was impossible to trace money as money. A change of view which began with *Taylor* v. *Plumer*[6] was re-stated in *Pennell* v. *Deffell*[13] and perfectly or imperfectly reiterated in *Frith* v. *Cartland*.[15] Any doubts on the matter were set at rest, and the proposition that money, if it could be identified, could be followed, was established by this decision. The decision also affirmed that the basis of tracing was founded upon title, and that the right to trace and follow was not confined to trusts and trustees in the strict sense, but to all persons standing in fiduciary relation. Thesiger L.J. also stated the exception to the rule in the form, "Although there may have been a trust with reference to the disposition of the particular chattel which those moneys subsequently represented, there was no trust, no duty in reference to the moneys themselves beyond the ordinary duty of a man to pay his debts; in other words, that they were cases where the relationship of debtor and creditor had been constituted, instead of the relation either of trustee and *cestui que trust,* or principal and agent."

The decision in the matter of other claims that arose in the administration of the same estate, established by a majority view amongst the Judges, that the rule in *Clayton's case*[17-a] in regard to the order of appropriation of drawings against payments in serial order, was no longer applicable as between the trustee and the *cestuis que trustent* as a class. (*See also* In re *Oatway*.[18]) For the application of the rule as between the beneficiaries themselves, *see* In re *Stenning, Wood* v. *Stenning*.[19]

Cases in the reports subsequent to 1879, apart from the refreshing decision in *Sinclair* v. *Brougham and another,*[20] illustrate different aspects in the law of tracing, flowing from the basic principles of "identity" and "title". First amongst them is the case of In re *Hallett & Co.,* Ex parte *Blane*[21] and the

1. (1710) 1 Salk 160: 91 E. R. 149.
6. (1815) 3 M. & S. 562: 105 E. R. 721.
13. (1853) 4 De G. M. & G 372 : 43 E R. 551.
15. (1865) 2 H. & M. 417: 71 E. R 525.
17. (1879) 11 Ch. D. 772.
17*a*. (1815) 1 Mer. 572: 35 E. R. 781.
18. (1903) 2 Ch. 356.
19. (1895) 2 Ch. 433
20. (1914) A. C. 398.
21. (1894) 2 Q. B. 237.

question arose in the bankruptcy of Hallett & Co. Blane and Hallett, trustees of a will, who held debentures in Hewitt & Co. which were being paid off, authorised Hallett & Co., in which the trustee Hallett was a partner, to collect the value of the debentures. There were other customers of Hallett & Co., who desired to invest in new debentures, and the result was that Hallett & Co. had to pay to Hewitt & Co. more money for the new debentures than they were entitled to receive from Hewitt & Co., for debentures paid off. The accounts were settled as between the two banks not by payment *in specie* but by a set-off in the books, Hallett & Co. paying the difference to Hewitt & Co. It also transpired that the new customers who invested in new debentures through Hallett & Co. did not themselves pay cash to Hallett & Co. who purchased new debentures in their customer's name merely on their credit. This fact appears from the concluding portion of the judgment of Davey L. J. though it is assumed in the judgment of Esher M. R. . Hallett & Co. suspended payment, and had an account with Cocks & Co. in which there continued to be to their credit an amount not below £4,000 from the date of their realisation of Blane's debentures up to the time of bankruptcy. Blane claimed a payment in full for the £1,600, the value of his debentures, that were paid off, from the amount in credit with Cocks & Co. to the exclusion of a large body of unsecured creditors. Vaughan Williams J. in the first instance made the order, and the reasoning of his judgment was this:

(1) The current account of Messrs. Hallett & Co. with Cocks & Co. became in credit £1,600 more than it could have been but for the payment off of these debentures. (This conclusion is stated on the assumption, that but for the payment off of these debentures, Hallett & Co. would have had to borrow from Cocks & Co. this £1,600 to pay Hewitt & Co. for the new debentures).

(2) From that time down to bankruptcy the current account with Cocks & Co. never went below £1,600. (The suggestion is that the trust fund stood undissipated.)

(3) If it was a case of the trustee Mr. Hallett paying the collections from debentures mixed with his own money, into the bank, Cocks & Co., In re *Hallett's Estate*[12] would apply.

(4) The fact being different, *viz.*, that the collection was made by Hallett & Co., bankers in which Hallett trustee, was only one of the partners, and that it was this bank which

12. (1880) 13 Ch. D. 696.

invested the money with Cocks & Co., Hallett & Co. received the amount of collections as bankers and not as agents, *i.e.*, as loan simply.

(5) As a loan to Hallett & Co. the amount got merged in the general assets, unless there is a breach of trust in the investment, and Hallett & Co. had notice of it.

(6) The placing of money in a bank by a trustee pending investment is ordinarily no breach of trust, but since Hallett a partner knew that his own bank was not solvent and nevertheless invested the money in it, there was a breach of trust.

(7) Hallett & Co. as bankers had through their partner Hallett, notice of breach of trust and therefore the money was traceable against them, and in respect of funds with Cocks & Co., on the assumption involved in the first point abovementioned. This judgment was reversed by the Court of Appeal, consisting of Esher M. R., Lopes L. J. and Davey L. J..

Esher M. R. held that the transaction in the first instance with Hallett & Co. was only one of loan; and said: "It is only fair to say that when Blane gave Hallett & Co. authority to receive this money they knew as a fact that he was a trustee; and although the result of the transaction was only to make them debtors to their customer, yet if the money, which was trust money, could be followed, and if it could be shown what was done with that actual money, the doctrine of following trust money would apply. But that is the difficulty in the case Can Colonel Blane, by virtue of the authority which he gave, shew that Hallett & Co. did actually receive the money, and further shew where it is now? Hallett & Co. did not in truth receive any money; they entered into a transaction with Hewitt & Co. the result of which was that no money passed; although in one sense Hewitt & Co. put Hallett & Co. in the position of being unable to say to Colonel Blane that they had not received the money, yet Hallett & Co. did not in fact receive any money, or tender of money or anything tangible which it would be possible to follow or to lay hands upon. Had there been anything in existence representing that which the bankers were authorised to collect, Colonel Blane might have followed it; but he cannot shew that; he can only show a transaction between Hallett & Co. and other persons. All that can be shown is a settlement of account, and a settlement of account cannot be followed." To the same effect is the judgment of Davey L. J. He says: "I have no doubt that, for the purpose of making them the debtors of Captain Blane's trustees, this money was received by Messrs. Hallett & Co.; but it was not received

by them in any sense which is material to the present purpose. Nothing was received by them *in specie,* notes, cheques, or coin; there was no credit existing *in specie,* nothing which the *cestui que trust* could follow and say that the property had been converted into." He puts the question "Was it lent to Cocks, Biddulph & Co. . . . It clearly never was." "The £1,600 was never paid into Cocks & Co. in any form, nor was it ever lent to them in any shape, nothing representing that £1,600 ever got into their possession on account of Hallett & Co., and the latter never got credit from the former for that sum in their account. Speaking for myself, it seems manifest that the account of Cocks, Biddulph & Co. was not increased by £1,600."

The judgment of the Court of Appeal thus emphasises what was overlooked by Vaughan Williams J. *viz.,* that the basis for tracing is the receipt by the trustee of something *in specie,* which can be traced through its transformations. The obligation to prove the continued identity of the thing follows as a necessary corollary. Blane's claim failed on both grounds. There was no receipt *in specie* of trust money by Hallett & Co., no augmentation of its assets thereby, nothing which entered into its future assets as a thing which you could lay your hands upon. Another ground is that no such trust fund got mixed up with the funds in Cocks & Co. so that the ultimate assets in the hands of Cocks & Co. cannot be said to have included any portion of the trust fund.

Assuming even that the transaction between Hallett & Co. and Hewitt & Co. was not a mere adjustment in books of account, but an actual transfer and retransfer of money *in specie,* the decision could not have been different. For one thing, the trust amount did not in fact swell the funds with Cocks & Co. and that is sufficient answer, when it is the assets with Cocks & Co. that are sought to be charged. For another, the position may be explained with reference to another principle, *viz.,* that the amount received from Hewitt & Co. in payment of the debenture was dissipated by Hallett & Co. in paying their own debts on behalf of other customers to Hewitt & Co. If the debenture money was received by them in cash, it only momentarily swelled their assets; the next moment, it was dissipated in payment of their own debt, and did not continue in their own assets. In this view, the inquiry would stop at a stage even before a determination of the character of Hallett & Co.'s fund with Cocks & Co.

Another interesting case is that of *James Roscoe* v. *Winder*[22] and it emphasises from another point of view the necessity for continued identity between the original trust fund and the fund in Court in respect of which the claim is made. In that case, the purchaser of a business covenanted with the seller to collect the book debts of the business as on a stated date and pay them to him. The purchaser did collect such debts to the value of about £455, paid the same into his general account at a bank, and drew upon it for his own purposes without making payment to the seller until it became depleted save for a sum of £25. Subsequent to such date, he put in moneys of his own into the same account and drew from the account with the result that on his death there was a credit balance of about £358. The seller claimed the bank balance in payment of the £455 due to him. The Court, Sargant J., held that he was entitled to no more than £25, the least intermediate balance, from out of the bank account.

The argument for the plaintiff was that "the banking account must be looked at as a whole, and the balance from time to time standing to the credit of the account is subject to one continual charge or trust." On the other side, it was contended that the money capable of being followed should be a specific sum forming the trust money or part of it, capable of being identified as such and reliance was placed on the observations of Davey L. J. in In re *Hallett & Co.*, Ex parte *Blane*[21] and of Wood V-C. in *Frith* v. *Cartland*.[15] It was submitted that the money paid into the bank after the trust money had been drawn out, was not paid in in execution of the trust and is not impressed with it. Upon these arguments of Sargant J. said at page 68: "You must, for the purpose of tracing, which was the process adopted in In re *Hallett's Estate*,[12] put your finger on some definite fund which either remains in its original state or can be found in another shape. That is tracing, and tracing, by the very facts of this case, seems to be absolutely excluded except as to the 25*l*. 18*s*." The learned Judge added that no case decided that the trust was imposed upon any property into which the original fund could not be traced, and that if the money subsequently put into the accounts should be chargeable with the trust, there should be proof of sufficient indication of the intention on the part of the debtor to substitute those additional moneys for the original trust moneys and accordingly

12. (1880) 13 Ch. D. 696.
15 (1865) 2 H. & M. 417: 71 E. R. 525.
21. (1894) 2 Q. B. 237 at 244.
22. (1915) 1 Ch. 62.

"to impose by way of substitution the old trusts upon those additional moneys."

This last mentioned distinction is fully illustrated by the case of *Harris* v. *Truman*[23] affirmed in 9 Q. B. D. 264.

At first sight the decision seems somewhat startling and inexplicable. But a close examination of the facts not only justifies the decision but also emphasises the principle by illustrating the exception. In that case the defendant, a brewer, employed a malting agent and the course of business between them was for the malting agent to buy the necessary barley, give samples and accounts relating to purchases to the defendant who supplied the necessary moneys with reference to the accounts that the malting agents delivered from time to time. The malting agent, however, in fraud of the defendant whom he kept from the knowledge of actual events, used the cash supplied, and the barley purchased, for his own purposes and kept the defendant off any scent of suspicion by supplying the malt required by the defendant by purchasing barley or ready-made malt on credit from others. The malting agent subsequently absconded and was adjudicated bankrupt and there was at the time in his premises barley to the value of £22,000 and malt for £35,000, the value of both together exceeding the amount of defendant's money paid up to then, money which was ostensibly supplied for the purchase of barley but which had been misappropriated by the malting agent. The defendant claimed as against the plaintiff, the assignee in bankruptcy, to retain the malt and the barley found on the premises which the defendant had taken possession of, against the amounts owing to him.

On these facts it was found first, that the moneys advanced by the defendant for the purchase of barley were impressed with a trust, and, secondly, that the stock on the premises was either the product of trust moneys or in substitution of the barley, in payment for which the malting agent ought to have applied such trust moneys. An argument founded upon reputed ownership was also negatived, "it being notorious that malting agents are not usually the owners of the barley and the malt at their maltings." On these findings the defendant's claim was upheld, and the key to the decision lies in the findings of fact on page 352 of 7 Q.B.D. Field J. says, "It therefore seems to follow that when, in order to have barley on his premises to malt sufficient in quantity, to represent that, for the purchase of which he ought to have applied the money which he had fraudulently devoted

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23. (1881) 7 Q. B. D 340.

to other purposes, he bought and brought on to the malting and proceeded to convert into malt barley otherwise bought, it is an irresistible presumption that he did so with the object and intention of malting that barley and supplying it as malt to the defendants, and of representing to them (as he in fact did at the end of every season, and in effect whenever upon their visits of inspection they saw barley on the premises) that the barley thus bought was bought for the benefit and purposes of the defendants in lieu of that which he ought to have applied their money to the payment of, and that he thus intentionally and irrevocably declared, as it seems to me, that he held that substituted barley upon the original trust with which the defendants' advances were impressed, and upon which he would have held barley bought with their money." To the same effect is the observation of Bowen J. on page 361. "It appears to me that both parties meant that the specific barley purchased by the bankrupt and brought upon his premises should be appropriated to the purposes of the malting." Thus whatever other grounds there may be leading to the conclusion, it is amply justified by the facts above stated and in this view the decision illustrates the exception enunciated in *James Roscoe* v. *Winder.*[22] Thus tracing requires the continued existence of the original thing identifiable as such or something that had taken its place in substitution thereof.

We now come to the authoritative decision of the House of Lords in *Sinclair* v. *Brougham and another*[20] which clarifies the fundamental principles on which the law of tracing is based. The case itself is more often referred to on the question of the *ultra vires* character of acts beyond statutory powers, and as an exposition of the basic principles of the action of "money had and received"; but none the less it is an authoritative exposition of the principles of tracing.

In that case, a Building Society acting *ultra vires* of its powers as a Society and not merely of the powers of the directors, received deposits from depositors and was wound up. Questions arose as to the order of distribution of the available funds as among (1) the outside creditors of the society, *i.e.*, not being depositors, (2) the shareholders, and (3) depositors whose deposits had been accepted by the Society *ultra vires* of its powers. Eventually the contest reduced itself to one of claim for priority by a set of shareholders over the depositors. At the arguments before the House of Lords, on the suggestion of

20. (1914) A. C. 398.

22. (1915) 1 Ch. 62.

the Lord Chancellor about the applicability of In re *Hallett's Estate,*[12] Kay K.C. for the depositors, relied also upon 'tracing' as one of his grounds. The arguments in reply thereto of Upjohn K.C. are very interesting. He first said that an ***ultra vires*** contract of loan is void and gives rise to no debt, save where the money paid is applied to the discharge of the lawful obligations of the Society so as to that extent not to increase the pecuniary obligations of the Society; that money paid under an ***ultra vires*** contract does not become the property of the Society but remains that of the payer, and so long as he can identify it he can trace it to any number of changes and claim on the footing that it is and always has been his property, the burden, of course, of proving the identity being on the person who alleges it, that in this view the claim is put on "property," and there can be no right of property without identification; that apart from a tracing order proper, ***i.e.,*** an order enabling an individual depositor to trace his deposit into some asset of the Society, no claim can be made on the ground of property and that tracing cannot exist as a matter of speculation. He added that a claim for tracing was inconsistent with the admissions made on behalf of the depositor, whereby outside creditors were given priority which they could not have had if a tracing order could be made, and that the principles of tracing were applicable only on the footing of fiduciary relationship which it was confusion to adopt, to a case of common law liability arising from a tort.

Dealing with this position, the Lord Chancellor says(p. 418): "The depositors . . . will not succeed unless they are able to trace their money into the hands of the society . . . as actually existing assets . . . Their claim cannot be ***in personam*** and must be ***in rem,*** a claim to follow and recover property with which in equity at all events they had never really parted." Then the learned Lord proceeds to lay down the history of the law of tracing in the case of money. He says: "In most cases money cannot be followed," owing to the difficulty of establishing a title ***in rem.*** If money passes into currency, according to law not only possession but property passes. But this "exception to the general requirement of the law as to title" is not extended "beyond the limits which necessity imposes". So where money is kept in a bag and stolen in that form, or money is used by a wrongful taker to purchase a parti-

12. (1880) 13 Ch. D. 696.

cular asset, that asset, if it can be identified as purchased with the money, can be traced. Lord Ellenborough applied this principle to the case of a broker who wrongfully invested money of his principal in purchasing securities. The reason for the rule is that the wrongful taker cannot as against his principal plead that his possession is property. But according to Lord Ellenborough, this rule again, is limited, for, if the agent paid the money not in purchasing an asset but into his general account with the banker, the money passed into currency and there was an end to tracing because a debtor and creditor relationship had arisen between the agent and his bank and that precludes the notion of following the money. The learned Judge says that to this extent the doctrine of common law also went, the limit being "so long as the relation of debtor and creditor has not superseded the right *in rem*." Then the learned Lord refers to the case of Ex parte *Cooke*[16] explaining *Taylor* v *Plumer*[6], and the observations of Thesiger L. J. in In re *Hallett's Estate*[12] who speaks of the existence of a fiduciary character so as not to create a relationship of debtor and creditor and says: "It is, in my opinion, impossible to confine the right at law to follow to cases where there was a fiduciary relationship. The principle appears to me to cover all cases where the property in the money has not passed and the money itself can be earmarked in the hands of the person who has wrongfully obtained it. A person standing in a fiduciary relation may be in this position, but it is not because of the trust or fiduciary duty. The common law which we are now considering did not take cognizance of such duties. It looked simply to the question whether the property had passed and if it had not, for instance, where no relationship of debtor and creditor had intervened, the money could be followed." Thus far, the learned Lord says, the common law went, but equity, which exercised a concurrent jurisdiction based on trust gave a further remedy. "The Court of Chancery could and did declare even against the general creditors of the wrong-doer that there was what it called a charge on the banker's debt to the person whose money had been paid into the latter's bank account in favour of the person whose money it really was." Jessel M.R. in In re *Hallett's Estate*[12] applied this equity not merely to cases of trust but to all cases of fiduciary relationship where money was held to belong in equity to the plaintiff. A charge was declared "on the investment in a debt due from bankers on balance or on any

6. (1815) 3 M. & S. 562: 105 E. R. 721. 12. (1880) 13 Ch. D. 696 at 723.
16. (1876) 4 Ch. D. 123.

mass of money or securities with which the plaintiff's moneys have been mixed." The learned Lord then asks that if that was the principle, why it should not apply to a case of *ultra vires* contract where the property was never converted into a debt, in equity at all events, and there had been throughout a resulting trust, though not of an active character.

The process of reasoning is this: It was *ultra vires* of the Society to borrow, *i.e.,* to undertake to repay the money. But when the depositors paid in moneys, it was in consideration of the undertaking by the Society to repay the amount, that they allowed their money to be used by the Society as its own. This consideration failed with the result that the depositors had paid, and the Society had received, moneys without any consideration moving from the one to the other—with the consequence that the depositors had the right to follow the money into the assets into which the moneys had been invested.

Thus far about the enunciation of the principles of the law of tracing. If in truth the basic principle of tracing is founded upon title, upon property, there is no reason to confine it either to trusts or even fiduciary relationships. It ought properly to apply where one man has the property of another in a position that the title of the owner subsists and the other acquires no property in it.

Having dealt with the facts of the case and the principles of tracing as enunciated by the Lord Chancellor, it would be interesting to discuss the actual decision in the case and the principles upon which it was founded.

To recapitulate, there were three sets of competing claimants: (1) the outside creditors, (2) the depositors, and (3) the shareholders. The outside creditors had been paid in full and no question arose about the validity of that payment—a fact which enabled Upjohn K.C. to contend that if the strict principles of tracing could be applied to the case of the depositors, it would necessitate the re-opening of the payment to the outside creditors. As regards the depositors, upon the principles of tracing enunciated at length, they would be entitled to trace for their deposits, though there was no question of a fiduciary relationship between the depositor and the Society. Then there is the claim of the shareholders. But they paid money and got full consideration for it in the shares issued to them. The money therefore became the money of the Society. Any claim to the existing assets could therefore be made only by the Society and not by the shareholders.

Thus, the depositors on the one side and the Society on the other, have rights to follow in respect of the fund in the hands of the liquidator; and the question arises whether the principle of *Hallett's case*[12] can be applied. Are the depositors and the Society in the same relation to each other as the principal and agent stood in *Hallett's case*[12]? They are not. The principal in *Hallett's case*[12] had the remedy, *viz.*, to aver the breach against the agent, who cannot set up his own misconduct to gain an advantage for himself or his general creditors as against his principal by pleading his own breach of trust. The depositors in *Sinclair* v. *Brougham*[20] had no such alternative right "to disaffirm the transaction to the extent of claiming on the footing that their money has been applied in breach of trust". They can only "adopt the dealings with the money they had handed over under circumstances in which it never really ceased to be theirs, and claim the part of the mass of general assets which represents it as belonging to them in equity". There was no breach of fiduciary duty on the part of the Society, and that distinguishes the case of In re *Hallett's Estate.*[12] There is no question of the Society being disabled by the existence of fiduciary obligations from putting forward its own claim. The agents of the Society acted *ultra vires* in the application not only of the depositors' but of the Society's own money and it is in the case of the Society, as in that of the depositors, a question only of a right to follow. "It arises between persons each of whom claims that . . . certain moneys were his and never ceased to be his, and are now represented by specific assets." The depositors therefore can only claim on a principle of apportionment of the depreciated assets, and specific tracing is not possible. The actual decision therefore is not one illustrating the principles of strict tracing.

It is significant to note that it was admitted that the funds in Court being far larger than the amount of the contributions by the shareholders, embraced the moneys of the depositors. It is also useful, in understanding the principles of tracing, to remember that when we talk of a charge on a mixed bank debt it is only "to express compendiously but somewhat loosely that the indebtedness was for a single sum of which the amount of the principal's money was an integral part, and that the agent could not draw on account of the single sum in which he had improperly mixed his own funds with the money of his principal, until he had made good the amount of his money."

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12. (1880) 13 Ch. D. 696.

20. (1914) A C 398.

The judgment of Lord Dunedin is instructive. He refers to the arguments against the rights of depositors in these words: "The only right of the depositors is a right to vindicate property; or in other words when you have a *jus in re* you can enforce it; but if the thing has so disappeared that a *jus in re* is no longer to be found (and this must practically be so in the case of money), then your remedy is gone." In another place he says, "You cannot have a *jus in re* in currency," and at yet another, "All that is left to it (the common law) is to vindicate *in forma specifica* and its forms of action fail when the thing can no longer be identified." Then the learned Lord criticises the argument in that "it lies in the idea that the *jus in re* represents the depositor's only right: that there can be no obligation on the other side at all," and solves the problem thus: "Equity— I am now speaking of technical equity—has already found itself able, in the exercise of its auxiliary jurisdiction, as the respondents admit, to deal with the situation when the money has gone to pay a just debt. Is its action limited to that situation? I think not. I think it can always in the exercise of the same jurisdiction help the common law by tracing and can say that if the proceeds can be shown to be what I have called a superfluity in the person of the recipient, then it will hold that that property is traced just as surely as if it was still in the original form." In such a case the defendant does not "pay as a debt the equivalent of what he originally got," but merely surrenders "what he still has as a superfluity, an enrichment, which, but for the original reception of the money, he would have been without." The learned Lord proceeds, "it, therefore, in each case becomes a question of evidence. Now, that the Society, in the present case, has got a superfluity, is obvious," and later adds, "In my judgment, they (the outside creditors) were rightly paid . . . and had they not been, they would stand . . . as first in the ranking," a statement, which shows that the learned Lord was not enunciating the law of strict tracing.

That the decision in *Sinclair* v. *Brougham*[20] is not founded on principles of strict tracing is also explained both by Lord Parker and by Lord Sumner. After explaining that on the principles of In re *Hallett's Estate*[12] one would be entitled "to follow the money as long as it, or any property acquired by its means, could be identified," Lord Parker proceeds, "Here is a mass of assets arising in the course of an *ultra vires* business

12 (1880) 13 Ch D. 696.

20. (1914) A. C. 398.

carried on by the directors and agents of the Society . . . What is left may be taken to represent in part the moneys of the *ultra vires* lenders and in part the moneys of the Society wrongfully employed in the business. The equities of the *ultra vires* lenders and of the Society are equal." Lord Sumner says: "What ought to be done, I think, is clear; the only difficulty is how to describe the principle and how to affiliate it to other legal or equitable rules. The question is one of administration . . . In my opinion, if precedent fails the most just distribution of the whole must be directed, so that no recognised rule of law or equity be disregarded. In this case, neither the shareholders nor the depositors have the better equity . . . The claims of each class are equal and, I think, for the purpose identical . . . The principle on which *Hallett's case*[12] is founded, justifies an order allowing the appellants to follow the assets not merely to the verge of actual identification, but even somewhat further in a case like the present where after a process of exclusion only two classes or groups of persons having equal claims are left in and all superior claims are eliminated. Tracing, in a sense, it is not, for we know that the money coming from *A* went into one security and that coming from *B* into another, and that the two securities did not probably depreciate exactly in the same percentage. . . . Still I think this well within the 'tracing' equity, and that among persons making up these two groups, the principle of rateable distribution of assets is sound."

It will be seen that from the foregoing discussion, the following conclusions emerge:—

(1) The right to trace is the right of property, it is founded on ownership, on title; it is a right *in rem*, not one *in personam*.

(2) As a corollary to the above, the subject-matter must be a *res* capable of being followed through and identified.

(3) Early decisions applied the doctrine first to trustees only and then to all cases of fiduciary relationship; but *Sinclair* v. *Brougham*[20] has shown that if the doctrine is founded upon title, *i.e.*, upon property, it would equally apply to all cases where the property of one is found in the possession of another without the former losing title and the latter acquiring it: cases which would give rise to a kind of resulting trust, though not of an active character.

12. (1880) 13 Ch. D. 696.

20. (1914) A. C. 398

(4) Where the tracing order is asked against a trustee (the word "trustee" being used in a wide sense to cover all cases of fiduciary relationship) the order follows, whether the act as the result of which the transformation of the subject-matter takes place, is an authorised act or is a breach of trust; for in the latter case the beneficiary has the option to waive the wrong and claim the property.

(5) Where the tracing order is sought against a third party, the act by which the property passes into the hands of such third party must be a breach of trust; for otherwise a valid title would have passed to such third party and there could be no tracing founded on the beneficiary's title to such property in his hands.

(6) Tracing was first applied only to goods and chattels, and was held inapplicable to the case of money, on the supposed impossibility of tracing it, because "money has no earmark".

(7) Later, it was extended to cases where the money is found to have been invested in lands and the Statute of Frauds was got over by the application of the principle of resulting trust.

(8) Later still, tracing was allowed in the case of money up to the limit where it was identified to exist in a mass mixed with other moneys; the principle that money has no earmark being limited to refer to the passing of money in currency, wherein property passes with possession.

(9) The tracing of money, in the absence of an identifiable *jus in re* where it passes into currency, is an extended jurisdiction of equity which holds property traced, where there is a superfluity in the hands of the recipient, an enrichment which, but for the original reception of the money, he would have been without. This is the utmost limit to which tracing can go according to Lord Dunedin.

(10) When we speak of a charge for trust moneys on a mixed fund, it is a loose use of that expression and we merely contemplate the mixed sum as a single sum of which the beneficiary's money forms an integral part and that the trustees cannot draw on account of the single sum in which he has improperly mixed his own funds with the money of the beneficiary, until he has made good the amount of the beneficiary's money.

(11) As a proviso to (4) *supra,* where in the case of money, the relation between the claimant and the defendant be-

comes one of debtor and creditor, either because the defendant is authorised to make use of the money as freely as if it were his own, or, is intended so to do by contract, express or implied, or by custom, or usage, or course of dealing, there can be no tracing. In other words, to enable tracing into a mixed fund, the mixing up must have been wrongful.

(12) In all cases, proof of continued identity or presumed identity of the original property with the ultimate property which is claimed, is necessary and where the means of ascertainment fail, tracing fails.

(13) As a corollary to (2) and (12) *supra*, where no money is received by a trustee *in specie* there can be no tracing. A valid obligation as for a debt may arise, for example, by adjustment in accounts, but that will not give rise to a case for tracing.

(14) As another corollary to (12) *supra*, where money that comes into the hands of a trustee is dissipated by him the right to trace is *pro tanto* lost. The right to trace exists only against the least intermediate balance during the currency of the account.

(15) As a proviso to (14) *supra*, where the trustee substitutes other property in the place of the dissipated property, the trust, with the consequential right to trace to it, will attach to such property, but only in cases where the intention to make such substitution is clear.

(16) If a person, holding money in trust, mixes it with his own money and draws out a portion from the blended fund for his own use, he will be held to have drawn out his own money and not any portion of the trust money. The rule in *Clayton's case*,[17-a] setting drawings-out against payments-in, in the order of their sequence does not apply to this case, though it is applicable to a case where the mixed fund belongs to many beneficiaries, and a conflict among them *inter se* arises as to the character of the remaining funds.

(17) The illustration given by Turner L.J. of a continuance of a business by a surviving partner with the deceased partner's assets, belongs strictly to a different branch of law, as explained by Lord Hatherley in *Lord Provost etc. of Edinburgh* v. *Lord Advocate*[14] though it can be justified on principles of tracing as well.

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14. (1879) 4 A. C. 823. 17*a*. (1815) 1 Mer. 572: 35 E. R. 781.

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ON TRACING

Turning to the decisions in Madras, the earliest decisions are those which arose in the insolvency of Messrs. Arbuthnot & Co. The first among them is that of *Official Assignee of Madras* v. *Smith.*[24] There a Mr. Smith sent Rs. 627 to Messrs. Arbuthnot & Co. to keep in fixed deposit along with another Rs. 573 which he proposed to remit. Messrs. Arbuthnot & Co. failed before the latter remittance and the question was if Mr. Smith was entitled to be repaid Rs. 627, which had been kept in suspense account, out of the general assets. The Commissioner in Insolvency made the order as prayed, but on appeal that order was set aside and amongst the appellate judges was Mr. Justice (now Sir John) Wallis. The actual decision was founded on the well-known decision of *Foley* v. *Hill,*[25] which established that the relation between a banker and customer is only that of debtor and creditor, that no kind of fiduciary relationship exists between them, and that the banker is entitled to make use of any money that comes into his hands, for profit in the ordinary course of business as if it were his own, unless there were specific directions to the contrary. Their Lordships held that there were no directions to the contrary from Mr. Smith so as to render the general rule inapplicable, and consequently held, reversing the learned Commissioner's judgment that Mr. Smith was entitled to rank only as a creditor. This decision, however, was dissented from by Abdur Rahim J. in *Official Assignee of Madras* v. *Rajam Aiyar*[26] on the ground of the distinction taken by him in *Official Assignee of Madras* v. *Oriental Government Security Life Assurance Co.,*[27] *viz.*, that the claimant whose money it was that was held

24. (1908) I. L. R. 32 M. 68. 25. (1848) 2 H. L. C 28: 9 E. R. 1002.
26. (1909) I. L. R. 33 M. 299. 27. (1909) I. L. R. 33 M. 150.

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by the bank, was not a customer so as to enable the bank to appropriate, in their usual course of business, the moneys, as if they were the moneys of a customer. It was a case to which the general rule was inapplicable not because there were instructions to the contrary but because the individual was not himself a customer, and the general rule referred to was only between a banker and a customer. Abdur Rahim J.'s view was also upheld on Letters Patent Appeal so that the dissent from *Official Assignee of Madras* v. *Smith*[24] stands affirmed.

But the actual decision apart, there are loose observations, which, though they have only the value of *obiter dicta,* deserve to be considered. It is possible that in view of the ground of the ultimate decision, these were not scanned with care before they were made, and it is clear that the authorities upon which they are statedly founded, do not go the full length of the observations themselves. On page 69, it is stated that if Messrs. Arbuthnot received a sum "in a fiduciary capacity and were under a duty to keep it separate from their own moneys and not to use it, then, even though they in fact mixed it with their own moneys, it can no doubt be recovered out of the general assets of the insolvent on the principle explained by Sir George Jessel M. R. in In re *Hallett's Estate.*[12] Then their Lordships quote that principle, which, it is submitted, is accurately stated. The objection, however, is to the statement of the law by deduction by the learned Judges, from the principle of Jessel M. R.'s judgment, correctly quoted by them, *viz.,* that that principle enabled a recovery out of the general assets of the insolvent. Jessel M. R. in In re *Hallett's Estate*[12] did not lay this down and in that case itself the proceeds of the Russian bonds which the trustee wrongfully converted, stood identified with the funds in the bank. "The moneys remained at his bankers mixed with his own moneys at the time of his death, *i.e.,* he had not drawn out that money from his bankers." To deduce from this statement of the law that a recovery is possible from the general assets without reference to the identifiable existence of the trust fund mixed in that mass is to read into *Hallett's case*[12] something which is not there. It is no doubt true, that though at earlier times the doctrine that money had no earmark, by itself stood in the way of a tracing order being made in the case of trust money mixed with other private moneys, later decisions explained the doctrine with reference to the condition of money passing into currency and enabled

12. (1880) 13 Ch. D. 696. 24. (1908) I. L. R. 32 M. 68.

tracing in the case of money where it stood identified. Identification in some form, of the original fund, in the assets sought to be proceeded against is without question a *sine qua non* for a tracing order. Such identification may be proved as a fact, or as pointed out by Lord Dunedin, in *Sinclair* v. *Brougham*,[20] at the utmost, as a necessary presumption of fact from the existence of a proved "superfluity" unaccounted for by the defendant, but for the original reception of trust moneys. There is no authority for further extending the doctrine of tracing as available against any general assets.

The decision under consideration then refers to Ex parte *Dale & Co.*[17] and states that the Court of Appeal in holding that the actual decision in that case was wrong, held that the "proper decision would have been to allow the remitting creditor to recover the whole proceeds of the cheque out of the general assets." There seems to be no warrant in the language of the reference to Ex parte *Dale & Co.*[17] in In re *Hallett's Estate*[12] for saying that the Court of Appeal said that an order to pay out of the general assets should have been made in that case. It is unnecessary to state the opposite view that the decision in Ex parte *Dale & Co.*[17] was itself right, and that the criticism of Jessel M. R. was uncalled for in view of Fry J.'s own explanation in the judgment under appeal before Jessel M. R. In fact, in In re *Hallett's Estate*[12] Jessel M. R. was affirming the decision of Fry J.

Then there is a continuous series of four cases beginning from *Official Assignee of Madras* v. *Ramachandra Iyer.*[28] In the first two cases Munro and Abdur Rahim JJ., in the Appellate Court differed, but only as to the proper inference of fact to be drawn in the case. The law is correctly stated at page 142 in the judgment of Abdur Rahim J. He correctly says that the "doctrine of following trust property is no longer confined to properties which are capable of being traced *in specie,* although it might have been so in olden days. The modern developments of equity enabled the Court to follow trust money in all its transmutations, and to seize upon the fund or property into which it is traced for the purpose of making good thereout the trust funds."

The second case is *Official Assignee of Madras* v. *Lupprian*[29] and it went on appeal in I. L. R. 34 Mad. 121. It is

12. (1880) 13 Ch D. 696.
17. (1879) 11 Ch. D. 772.
20. (1914) A C. 398.
28. (1909) I. L. R. 33 M. 134.
29. (1909) I. L. R. 33 M. 145.

instructive that both the learned Judges agreed that as between a banker and customer, the pre-existing relation of debtor and creditor might get changed into one of a fiduciary character by appropriate actings of parties. In that case the customer gave directions to the bank to utilise the money with them on maturity for a certain purpose, and the bank replied that the instruction will be carried out in due course. Munro J. at first thought that this was sufficient to change the character of banker and customer into one of a fiduciary relationship, though when he heard the appeal in *Official Assignee of Madras* v. *Lupprian*[29a] he was willing to change his view. Abdur Rahim J. differed. He said that "some unequivocal act on the part of the debtor showing that he had changed his position into that of a bailee" was necessary, and that "a mere promise to carry out the directions of the customer . . . can have no higher legal effect . . . than a promise to pay the debt." The ultimate decision was in accordance with Abdur Rahim J.'s judgment.

A similar principle was applied in the third case, *Official Assignee of Madras* v. *Oriental Government Security Life Assurance Co.*,[27] and the two learned Judges concurred in the result. Munro J. took the view that the claimant had completed a demand for payment upon the bank before insolvency, so that thereafter, failing to remit, the bank held as agent for the claimant. Abdur Rahim J. based his judgment on the ground that the person whose money it was under the directions of the remitter, was not then a customer of the bank so as to enable the bank to appropriate the amount as customer's moneys in the usual course.

The fourth case, *Official Assignee of Madras* v. *Krishnasami Naidu*,[30] is one of importance, and it is of frequent application in this country. In fact later decisions of this Court have had to consider it. In that case the two learned Judges, Munro and Abdur Rahim JJ. concurred in their conclusions, though they differed in their reasoning. A settlor appointed the five persons who were at the time carrying on business as Messrs. Arbuthnot & Co. as trustees, defining that term as including "members or member for the time being constituting the firm of Messrs. Arbuthnot & Co.," and reserved power for himself, and after his death to the surviving or continuing trustees, to appoint a new trustee in the place of one who had died, etc., the result being an ultimate possibility of all trustees being per-

27. (1909) I. L. R. 33 M. 150. 29a. (1910) I. L. R. 34 M. 121.
30. (1909) I. L.R. 33 M. 154.

sons in no way connected with Messrs. Arbuthnot & Co. The settlor defined the purpose of the trust and directed that the trustees should invest amounts in their own name with Messrs. Arbuthnot & Co. The application was for preferential payment on behalf of the beneficiary, by three of the trustees who having been appointed to such office in the interval, were not members of Messrs. Arbuthnot & Co. The learned Judges concurred in rejecting the claim for preferential payment and holding that there was only a relation of debtor and creditor.

This conclusion, it is submitted, is undoubtedly correct on the one fact that the settlor authorised the investment with Messrs. Arbuthnot & Co. Even assuming that Messrs. Arbuthnot & Co., as such, were the nominated trustees, the utilisation by Messrs. Arbuthnot & Co. of the trust moneys in their business, as if they were their own, would have been a legitimate use of the moneys and not one in breach of trust. This is sufficient to put the claimant for tracing out of court. But Munro J. sought to make a distinction of the fact that in the settlor's mind, the trustees *qua* trustees, were different from the bankers *qua* bankers, though they might happen to comprise the same individuals. He thought that this difference in their legal character as contemplated by the settlor put the deposit in Messrs. Arbuthnot & Co. on the same footing as if it was a deposit with a stranger bank, with the consequence of creating the relationship of a mere banker and customer, and that the trustees held in trust only what was recoverable in whole or in part from the bank.

Abdur Rahim J. did not recognise the distinction which Munro J. sought to make out. He stated that that distinction might be relevant where a question of fixing the bank with notice of the trust by reason of one of its members being himself a trustee should arise, as it did, according to the judgment of Vaughan Williams J. in In re *Hallett & Co.*, Ex parte *Blane*.[21] He properly founded his judgment upon the authority given by the settlor, to invest it with themselves and held that the knowledge of Messrs. Arbuthnot & Co. that the amounts were trust moneys made no difference. He pointed out that the general duties of trustees as to the investment of trust moneys were subject to the first and foremost duty of a trustee to carry out the direction of the creator of the trust and said "if the settlor chooses to make it a term of the settlement that the moneys should be lent to the trustees themselves hoping

21. (1894) 2 Q. B. 237.

to get a profitable return, then it is the misfortune of the beneficiaries if the trustees become bankrupt, and they must be content to rank as ordinary creditor." It is significant that both Munro and Abdur Rahim JJ. relied upon the agreement to pay interest on the trust moneys as indicating the negation of a relationship of a fiduciary character and the creation of one of banker and customer.

Yet another case in the same volume is *Official Assignee of Madras* v. *Rajam Aiyar*,[26] which went on appeal in I. L. R. 36 Mad. 499, the ultimate decision being that the claimant's application for preferential payment should be allowed. The only question argued was, whether Messrs. Arbuthnot & Co. held the amounts in a fiduciary capacity or as bankers. Abdur Rahim J. emphasised the view he had taken in *Official Assignee of Madras* v. *Oriental Government Security Life Assurance Co.*,[27] that as the claimant was not a customer but a stranger to the bank, the general rule applicable to remittances by customers was inapplicable and that the bank held the amount as bailee. He also dissented in terms from *Official Assignee of Madras* v. *Smith*.[24] The Editor of the Indian Law Reports adds a note that the decision of Abdur Rahim J. was affirmed on Letters Patent Appeal.

It is significant that in none of the cases had the Court to consider the question whether tracing was possible against the ultimate assets of a trustee, without any proof of the identity of the original trust funds in the ultimate assets. Such a point does not appear to have been raised. In truth none of these cases viewed the facts in the proper angle as one for the application of the principles of strict tracing. They may illustrate one of the principles in the law of tracing, but they did not, one fears, realise the full scope of the doctrine, its implications and limits, and seek deliberately to apply it. No doubt they refer to In re *Hallett's Estate*[12] and other cases on the subject, but being cases which arose in Insolvency, they were more at a consideration of the "order and disposition" clause, and the question of "reputed ownership," than at defining the strict limits of tracing. They were at pains to decide simply whether the relationship was one of trustee and *cestui que trust*, or that of debtor and creditor, and no more. The unfamiliarity in this country with Administration actions is partly responsible for

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12. (1880) 13 Ch. D. 696.
24. (1908) I. L. R. 32 M. 68.
26. (1909) I. L. R. 33 M. 299.
27. (1909) I. L. R. 33 M. 150.

a late recognition of the principles of tracing and an attempt to apply them.

The first decision that recognised the position in clear perspective is that of Sadasiva Aiyar and Napier JJ. in *Mulrasu Lakshmi* v. *Official Assignee of Madras.*[31] It contains a clear exposition of the law on this subject, and is very instructive, and its non-appearance in any of the other reports does not detract from its value as an authoritative contribution to this branch of the law. In this case, the claimant entrusted to a jeweller sovereigns and gold to make into a jewel. The latter converted them into cash (which got mixed with his own funds) and became bankrupt. There was no evidence that the sovereigns and gold, or their value, must have been included in the final available assets. The claim was made for preferential payment, which the Court refused, the appellate Judges concurring with the trial Judge, Bakewell J., in the matter. Both the appellate Judges, in separate judgments deal with the law of tracing as laid down in the long series of English decisions ending with *Sinclair* v. *Brougham,*[20] and if one may say so with respect, they are clear and accurate expositions of the law. After stating that the decisions laid down the necessity for proof of continued identity, Sadasiva Aiyar J. says, "If in this case, I could have found my way to decide that the assets taken possession of by the Receiver or by the Official Assignee, did include, or must have included, the gold or the value of the gold contained in the sovereigns and the bar given by the petitioner to the insolvent, or that, though the petitioner's particular gold was misappropriated by the insolvent, he made *oddiyanams* or *mettus* with other gold (as in the case in *Harris* v. *Truman*[23]) *in order to fulfil his obligations to the petitioner* I would be inclined to apply the doctrine of tracing and the doctrine of quasi-charge even to the full limits indicated by Lord Dunedin in his judgment in the recent House of Lords case; but I do not see my way to differ from the finding . . . that the petitioner has failed to show that the gold or the price of that gold was invested in or formed part of any of the assets taken possession of by the Receiver or by the Official Assignee and I must therefore confirm the order . . . that the petitioner must be treated as a man who had lost the gold entrusted by him to the insolvent just as if the insolvent had converted it into cash and squandered it in

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20. (1914) A. C. 398. 23. (1881) 7 Q. B. D. 340.
31. (1915) 29 I. C. 37.

unknown ways before his insolvency." In an earlier part of his judgment, the learned Judge states, "the burden of proof (the burden of proving identity, on the part of the applicant) may be discharged by a sort of eliminating process, *i.e., A* (the applicant) might establish that the remaining securities, investments and assets in the possession or name of *B* (the trustee) ***must*** be the result of the use of *A's* funds." It is also significant that the learned Judge realises that the doctrine is taken to its maximum length at the limits indicated by Lord Dunedin in his judgment in *Sinclair* v. *Brougham*,[20] where he speaks of the existence of a proved superfluity unaccounted for save by reception of the original trust fund—an illustration of the indirect mode of proof of identity. Napier J. adds, "It is obvious that if the claim is ***in rem*** the *res* must be ascertained," and it is submitted that this one short sentence states the whole law of tracing.

Next in its turn is the case of *Krishnaji Bhat* v. *Sadasiva Tawker*,[32] on appeal, *Official Assignee of Madras* v. *Krishnaji Bhat*. The decision in the trial Court was that of Kumaraswami Sastri J. and it was affirmed on appeal, though on different grounds, by Reilly and Cornish JJ. In that case the father of the claimant Krishnaji Bhat, had handed a sum of Rs. 10,000 to Sadasiva Tawker of Messrs. Tawker & Sons, on which he subsequently engrafted by letter a trust in favour of his son, requiring at the same time that the trustee should invest the amount with himself and pay the interest thereon to the beneficiary. The suit as originally laid was by the claimant to remove the trustee on the ground that he was in insolvent circumstances and had committed a breach of trust in not carrying out the directions of the settlor, for appointment of a fresh trustee, and for directions to hand over to such new trustee the trust fund. Pending the suit, the trustee became bankrupt, and the Official Assignee was brought on record. The suit was then conducted on the footing of a claim for tracing against assets in the hands of the Official Assignee which consisted of the proceeds of sale of the showroom jewels of Messrs. Tawker & Sons. It was sought to be proved for the plaintiff that the original trust fund of Rs. 10,000 was in fact invested in the purchase of showroom articles, which by sale and re-purchase over and over again was in the shape of the showroom articles as they stood at the date of the insolvency, and thus the attempt was made

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20. (1914) A. C. 398.

32. (1926) 24 L. W. 869.   33. (1929) 59 M. L. J. 718.

to trace directly by evidence the original trust fund to the ultimate assets in the hands of the Official Assignee which were the proceeds of the showroom articles. The learned Judge, Kumaraswami Sastri J., in the first instance, held that there was in the Official Assignee's hands the proceeds of a larger stock of goods, part of which were the goods so purchased from the trust fund and that therefore the plaintiff had a charge on the funds with the Official Assignee. It should be mentioned that the allegation of breach of trust was not sought to be substantiated before the Court, and the learned Judge stated that the evidence established that "acting on the permission of the author of the trust when the trust was created," the trust money was used for the purchase of goods.

In the Appellate Court, the learned Judges found that the identity of the trust money with the cash proceeds in the court, through the series of transmutations as alleged, was not made out, and that there was no breach of trust on the part of the trustee in utilising the trust money as if it were his own; but held that, notwithstanding these findings, the admitted investment of the trust fund in the business entitled the beneficiary to be paid preferentially from out of its assets.

The matter is now *sub judice*, pending appeal to His Majesty in Council, and among the points raised there, are the following.—

(I) The authority given by the settlor to the trustee to invest it with himself made the relation between the trustee and beneficiary one of debtor and creditor, the trust thereupon being of the debt and not of the money.

(II) The money representing the trust fund was, at the date of insolvency, in the order and disposition of the insolvent within the meaning of S 52 (*c*) of the Presidency Towns Insolvency Act.

(III) The settlor having previous to the creation of the trust handed the money to the would-be trustee who was thereby in debt to the settlor for the amount, the subsequent creation of the trust can only be in respect of that debt, with the consequence that if the debt dwindled the trust suffered to that extent; and

(IV) In any event, the ultimate assets not having been found to include the trust moneys or any portion of them, there could be no order for tracing against such assets.

The judgment of the Judicial Committee is awaited, and in the circumstances, the grounds of decision of the Appellate Court, Reilly and Cornish JJ., are not canvassed here.

Next comes the decision in *Official Assignee of Madras* v. *Devakottah Nagarathar Sri Minakshi Vidyasalai Paripalana Sangam.*[34] This was a decision on an appeal from the judgment of Waller J., which is quoted in the corresponding report in 57 M.L.J. 99. In that case, a Nattukkottai Chetti, banker and money-lender, was the treasurer of a school and one of its trustees. He collected various amounts of subscription for the school, and paid them all in into his own bank, into an account marked with the name of the school, and utilised them in his business, it is found, without the knowledge or consent of his co-trustees. He subsequently became insolvent, on which date the accounts showed a sum of Rs. 40,000 to the credit of the school. The co-trustees, on proof of this single fact, sought preferential payment of the amount from the realised general assets of the banking concern of the insolvent which came into the hands of the Official Assignee. Waller J., in the first instance, relied on S. 66 of the Indian Trusts Act as sufficient to dispose of the claim in favour of the claimant. He understood "the fund" referred to in the section, to be represented by the ultimate assets, and negatived the argument in favour of the necessity for continued identity of the trust fund.

On appeal, it is worthy of note that the learned Chief Justice, Coutts Trotter C.J., expressed his own diffidence in dealing with the question and the hope that the matter could be taken on appeal to the higher tribunal. This hope, however, was in vain as the matter was settled subsequent to judgment.

In dealing with the question, the learned Chief Justice states the several propositions established by English decisions in their order, beginning with the abrogation of the doctrine of the impossibility of tracing money adumbrated in early decisions, and ending with the case of a proved mixture of trust-funds with other moneys, out of which lands or goods might have been purchased. Then he states the question before him in this form:—"Then arises the case where the trust-moneys have not only been mixed with the trustee's moneys, but where there is no tangible asset which could be alleged to have been acquired with the trust funds, wholly, or partially," and states the finding of fact to be that "the business was so unsuccessful that the actual funds in the hands of the Official Assignee as at this

34. (1929) I. L. R. 52 M. 919.

date realised, amount to nothing," as compared with the original assets put into business. The learned Chief Justice then looks at the converse of the proposition submitted to him on behalf of the Official Assignee, and says, "that argument ultimately seems to me to imply that a trustee has only to put trust-moneys into business and then and there the *cestui que trust* is debarred from invoking the equitable doctrine, and sinks to the position of an unsecured and unpreferred creditor of the estate," and added that that view was negatived by Turner L.J. in *Pennell* v. *Deffell*[13] in the illustration he therein gave. The learned Chief Justice overlooked the fact that as against the trustee who misappropriated the money, the *cestui que trust* had, to start with, no higher right than that of a simple creditor.

The other learned Judge, Anantakrishna Aiyar J., makes a fuller citation of authorities, and states the law correctly, it is submitted with respect, up to the stage when he begins to consider the question directly involved in the case before him. With reference to that question, he simply says, "I am not clear why the doctrine should not apply when the trustee instead of utilising the trust-money for the purchase of property, utilised it in a trade or business of his own." Herein the learned Judge contemplates a situation which, it is submitted with respect, makes the whole case different and thereby entirely misses the basic principles of the law of tracing. The learned Judge refers to Turner L.J.'s illustration and adds one of his own, *viz.*, the rights to the ultimate assets of the purchaser of a going concern. The illustration of Turner L.J. has already been explained consistently with the principles of tracing, apart from the fact that, as Turner L.J. himself doubted, the principle of that illustration is properly a rule of partnership law which, as Lord Hatherley pointed out in *Lord Provost etc. of Edinburgh* v. *Lord Advocate*,[14] was the creature of slow evolution. The illustration newly added by Anantakrishna Aiyar J. is equally answered by saying that the purchaser of the concern purchased every item of the assets then in existence and had a title to each and every one of them, and it is these separate items of asset that through various transmutations stood in the form of the ultimate assets, into each of which must have been included one or other, or part thereof, of the original assets.

At the end of his judgment, Anantakrishna Aiyar J. refers to the case of *Mulrasu Lakshmi* v. *Official Assignee of Madras*[31]

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13. (1853) 4 De G. M. & G. 372: 43 E. R. 551.
14. (1879) 4 A. C. 823.
31. (1915) 29 I. C. 37.

and quotes *in extenso* from the judgment of Sadasiva Aiyar J. and winds up saying "The principle would seem to be that a wrong-doer cannot be permitted to take advantage of his own wrong, and that no wrongful act of the trustee could prejudice the rights of the beneficiaries in cases like the present." With great respect, while the proposition referred to by the learned Judge and stated in general terms, is undoubtedly sound, it has no application to extend the scope of the law of tracing, which stands defined by other principles. It is not a fundamental or a basic principle of 'tracing'. It merely aids in working out the result, where a proper case for tracing is otherwise made out Its application is limited to a case of a proved mixture of trust-funds with private funds, to prevent the trustee from laying any claims of his own to the "single sum" constituted by the mixture, before the beneficiaries have their claims satisfied thereout. To this extent a trustee in wrong cannot gain advantage by it (see *Sinclair* v. *Brougham*[20]). If the proposition laid down by the learned Judge were as broad and far-reaching in its consequences as the conclusion he derived therefrom is, the decision in *Mulrasu Lakshmi* v. *Official Assignee of Madras*[21] itself must be different, for there can be no special distinction in the case of the merger of the trust-fund in a business. In fact, Napier J. in that case negatived that very position, when he said, "It was contended before us that the appellant could recover as a preferential creditor on the principle that if the estate had been benefited by the transaction the value of the specific moveable can be recovered. It is sufficient to say that there is no authority for this broad proposition."

On this aspect, reference may also be made to proposition No. 3 in the arguments of Upjohn K. C. in *Sinclair* v. *Brougham*,[20] relied on by Sadasiva Aiyar J. in his judgment, *viz.*, that "the burden of proving the identity is on the person alleging it"; a statement which cannot be correct if the beneficiary need only prove a breach of trust and his own loss thereby. To hold that in all cases where a trustee misappropriates a trust-fund his act attracts the consequence that the beneficiary becomes thereby and forthwith a creditor of a higher nature to the extent that the entire assets of the trustee stand charged for the repayment of the misappropriated amount, is to innovate, by converting what according to the established doctrines of law is a simple debt owing by the trustee to the beneficiary, into a debt

20. (1914) A. C. 398 at 406, 422, 424 31. (1915) 29 I. C. 37.

of a higher nature, as if it stood charged on the trustee's estate, in other words, to confound a right ***in personam*** with a right ***in rem***. A passage in Lewin succinctly expresses the law in such cases, and it is submitted, correctly: "If the property possessed by the bankrupt in his character of a trustee has become so amalgamated with his general property that it can no longer be identified, the representative of the trust has then no other remedy but to come in as a general creditor and prove for the amount of the loss" (Lewin: Law of Trusts, 12th Edn., pp. 270 and 271).

The next and last case to be considered is that of *Nagappa Chettiar* v. *Official Assignee of Madras*.[35] The decision in the first Court was that of Waller J. who refused to make a tracing order and that judgment was affirmed by Curgenven and Bhashyam Ayyangar JJ. though on different grounds. The facts were that two members of a Nattukkottai Chetti family, one of whom subsequently became insolvent, agreed, on the occasion of a partition between them, to set apart funds for a charity. Both of them were bankers and the insolvent was then in very affluent circumstances. The other member, the applicant before the Court, drew for his share of the contribution, a hundi upon a firm of bankers known as O. R. M. O. M. S. P. in favour of the insolvent, the other member. The insolvent kept the money for a number of years for interest with the banker O. R. M. O. M. S. P. himself in the name of the charity. Some time later he transferred the deposit with that firm to his own firm at a time when there could be no question about his solvency. This transfer was effected by setting off in the books, the amount to the credit of the charity with O. R. M. O. M. S. P. towards a debt owing then by the insolvent to the said O. R. M. O. M. S. P. Corresponding entries were made in the books of the insolvent, the latter debiting himself and crediting the charity with a like amount. Some years thereafter the insolvency happened, and the applicant, the other member of the family, claimed as a co-trustee of the family-charity, to trace for the amount standing in the books of the insolvent to the credit of the charity. It was also the fact that the assets in the Official Assignee's hands against which the tracing order was sought, consisted of two sums, a sum of Rs. 5,000 not derived from the business in which the trust-moneys were invested, and another sum of Rs. 40,000 received by way of refund of income-tax in respect of a tax paid by the insolvent at a time when the charity money stood invested with O. R. M. O. M. S. P.

35 (1929) 58 M L J 36; on appeal 60 M. L. J 355

On these facts, Waller J. in the first instance refused a tracing order on the ground that the decision in In re *Hallett & Co.*, Ex parte *Blane*[31] directly applied. The learned Judge quoted the words of Esher M. R. "All that can be shown is a settlement of account, and a settlement of account cannot be followed", and said "I cannot think that a book-adjustment of this kind can be treated as a passing of money into the hands of the trustee". The learned Judge also held that the trust-money had not in any possible view got mingled with the assets in court, which cannot therefore be "treated as trust property, or as anything but the trustees' own property". It is submitted with respect that the judgment is certainly well founded on these two grounds. The learned Judge, however, negatived another argument urged on behalf of the Official Assignee against the possibility of a tracing order, and that deserves to be mentioned.

It was common ground that the insolvent had to pay interest on the charity amount at the *nadappu* rate, and upon that fact the argument was advanced that the relationship of debtor and creditor was created and that the act of the insolvent in utilising the charity amounts in his own business as if they were his own and mixing them with his own moneys, was legitimate and not wrongful, as he was authorised to invest them in his own business. The learned Judge negatived this argument, relying on the judgment of Kumaraswami Sastri J. in *Krishnaji Bhat* v. *Sadasiva Tawker.*[32] Though this latter case is, as stated already, pending final decision before the Judicial Committee, it may be permissible to say a word on the matter, upon Justice Waller's judgment.

It seems to follow that once it is conceded that the trustee is under an obligation to pay interest and that at the *nadappu* rate by agreement, enough has been conceded to make the remedy of a tracing order inapplicable. The undertaking by the trustee of the obligation to pay interest, necessarily connotes the consideration therefor in the liberty the trustee would enjoy to put the money to use; and if the money is so authorised to be used by the trustee, the title to the money becomes his, displacing the title of the beneficiary, whose title thereafter would attach to the debt.

In this connection the individual observations of Munro and Abdur Rahim JJ. in *Official Assignee of Madras* v.

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21. (1894) 2 Q. B. 237. 32. (1926) 24 L. W. 869.

Krishnaswami Naidu[30] referring to the implications of the obligation to pay interest, on the part of the trustee on trust-funds, are relevant.

In the Appellate Court, both the learned Judges, it is submitted, rightly agreed to differ from Waller J. on the point last mentioned, on which Waller J. negatived the argument for the Official Assignee. Curgenven J. said at page 359, "I find it very hard to see how, when trust money is handed over to any person, he be or he be not a trustee, to use in his business, and subject to the payment of interest, no relationship of creditor or debtor is set up. The circumstances that he may use the money as his own, and that he has to pay interest, seem to me to point clearly to the engrafting of a contract upon the trust, whereby title to the money is transferred, and the trust no longer can look to that particular sum of money, as its *res* or subject-matter, but to a promise to pay an equal sum". On the same question Bhashyam Ayyangar J. dissented in terms from *Official Assignce of Madras* v. *Krishnaji Bhat*[33] and expressed his concurrence with *Official Assignee of Madras* v. *Krishnaswami Naidu.*[30]

They further affirmed the judgment of Waller J. on the ground that the assets before the court did not in fact include any portions of the trust money.

Yet, on two other points that were argued in the case, the learned Judges made observations (on one of the points against the view taken by Waller J.), and these deserve consideration. The first of them is with reference to the right to trace to the realised general assets without the beneficiary undertaking the proof of the inclusion of trust-funds in those assets. Upon this matter, Curgenven J. first referred to *Pennell* v. *Deffell,*[13] and said, "There was clear observance in this case of the principle that the presence of a definite sum of trust-money in the account, must be ascertained before it can be claimed". Then he referred to In re *Hallett's Estate, Knatchbull* v. *Hallett*[12] and observed, "the original subject-matter of the trust may be traced into what other form different from the original it may have passed; the right only ceases when the means of ascertainment fail". Then he cited *Sinclair* v. *Brougham,*[20] and said, "If this distinction between a right *in personam* and a right *in rem* is kept clearly in view, it affords, I think, index to the necessary

12 (1880) 13 Ch. D. 696.
13. (1853) 4 De G. M. & G. 372: 43 E. R. 551.
20. (1914) A. C. 398. 30. (1909) I. L. R. 33 M. 154.
33. (1929) 59 M. L. J. 718.

limits of the doctrine of tracing". Then the learned Judge referred to the appellant's contention before him, which was to the effect, that all that he need show was that at some time the trust-fund went into the assets of the business, in order to give him a first claim for the whole amount upon any subsisting assets, and proceeded to say, "for this purpose we must regard the trade assets, he says, as a single entity, with an identity enduring throughout every phase and transformation, and taking its latest form in the sums now in the Official Assignee's hands. Now an assumption of this kind is to be found in two cases of this court, *Official Assignee of Madras* v. *Minakshi Vidyasala Sangam*[34] decided by Coutts Trotter C.J. and Anantakrishna Aiyar J. and the already cited case, *The Official Assignee of Madras* v. *Krishnaji Bhat.*[33] I think, it is clear from the English cases cited before us and which I have made some attempt to abstract, that this would take the theory of tracing a good deal further than any actual English decision would warrant, and in fact in both instances reliance was placed not upon an actual decision, but upon an illustration employed by Turner L. J. in *Pennell* v. *Deffell*,[13] the case of an executor of a deceased partner leaving the latter's capital with the surviving partners to trade with, and the persisting identity of the partnership-share through all its fluctuations. Whether or not this would afford a valid parallel to such a process of tracing . . ." Having gone thus far, the learned Judge refrained from answering the question which he said was not easy to answer, and solved the point for decision with reference to the facts which the case before him presented. Stating that it may not be "stretching it too far to adopt as a general presumption, the position, whether you can prove it by evidence or not, that trust-money put into a business is traceable to the eventual assets", he said that the presumption must be rebuttable, and that it was rebutted in the case before him inasmuch as the assets before the Court were shown not to include any portion of the trust-fund. We may leave the learned Judge's judgment of justified disinclination at that, and await another opportunity when the direct question may present itself for decision, untrammelled by any other facts or circumstances, as it was in the case under review.

The other point which was indirectly dealt with by Curgenven J. but dealt with directly by Bhashyam Ayyangar J.

13. (1853) 4 De G. M. & G. 372: 43 E. R 551.
33. (1929) 59 M. L. J. 718. 34. (1929) I. L. R. 52 M 919.

is the applicability of the decision in In re *Hallett & Co.*, Ex parte *Blane*.[21] Bhashyam Ayyangar J. distinguished this case on the ground that the book-adjustment therein was between Hallett & Co. and Hewitt & Co. and not with Cocks Biddulph & Co., the moneys with whom were the assets before the court; and Curgenven J. also observed, "I think that, if the facts of Ex parte *Blane*[21] are closely considered, it will be seen that Lord Esher's dictum that 'a settlement of account cannot be followed' must be read in the light of the special circumstances, and that the case is really only an exemplification of the necessity—clearly stated by Lords Justices Lopes and Davey—of being able to follow certain specific property. It was clear in that case that the trust money never came into the hands of the defaulters' bankers, but reached another destination by means of the settlement of account referred to". This no doubt was a ground of decision. But that was not the only ground. It deals with the last stage of the "quest," but it is respectfully submitted that Waller J. was right when he understood this decision as showing that the "quest" failed at the very first stage. As the result of the adjustment between Hewitt & Co. and Hallett & Co. there was no *res* to begin with, to enable a tracing. Esher M. R. says, "Can Col. Blane . . . show that Hallett & Co. did actually receive the money . . . ? Hallett & Co. did not in truth receive any money; they entered into a transaction with Hewitt & Co., the result of which was that no money passed; although in one sense Hewitt & Co. put Hallett & Co. in the position of being unable to say to Col. Blane that they had not received the money, yet Hallett & Co. did not in fact receive any moneys, or tender of money, or anything tangible, which it would be possible to follow or to lay hands upon. Had there been anything in existence representing that which the bankers were authorised to collect, Col. Blane might have followed it; but he cannot show that; he can only show a transaction between Hallett & Co. and other persons. All that can be shown is a settlement of account, and a settlement of account cannot be followed". Davey L. J. says: "I have no doubt that for the purpose of making them the debtors of Capt. Blane's trustees, this money was received by Messrs. Hallett & Co.; but it was not received by them in any sense which is material to the present purpose. Nothing was received by them *in specie*, notes, cheques, or coins; there was no credit existing *in specie*, nothing which the

21. (1894) 2 Q. B. 237.

cestui que trust could follow and say that the property had been converted into". The obvious distinction that is drawn is that while an obligation *in personam* was created by the transaction no right *in rem* arose, enforceable by a tracing order.

Bhashyam Ayyangar J. in his judgment says that the state of the accounts did not absolutely negative the idea of the passing of cash between the insolvent and O. R. M. O. M. S. P. But the answer is that this does not matter in the result. If the state of the accounts shows that O. R. M. O. M. S. P. brought cash to the insolvent to pay the charity fund, the same accounts show that the insolvent forthwith took that cash back to O. R. M. O. M. S. P. and discharged therewith his own debt to them. In this aspect of the facts, the amount of trust-fund was dissipated by the trustee and therefore no longer formed part of his assets *in specie*. His net assets might have increased by the discharge of his debt to O. R. M. O. M. S. P. but that is not, in any sense, "material to the present purpose". A similar argument was negatived in Ex parte *Blane*.[21]

According to Waller J. tracing failed at the initial stage; according to the appellate Court, it failed at the final stage; according to the view above presented, it failed at the intermediate stage.

SUMMARY OF ENGLISH CASES.

M'ALISTER (OR DONOGHUE) *v.* STEVENSON, (1932) A. C. 562.

Negligence—Liability of manufacturer of ginger-beer to consumer—Snail in bottle—Health of consumer injured—Liability of manufacturer

A manufacturer of ginger-beer sold his ginger-beer in bottles of dark opaque glass. The appellant bought a bottle of ginger-beer from a retail seller at Paisley, drank some of it but before consuming more found that a decomposed snail was in the bottle. The manufacturer had filled the bottle without noticing the snail. In consequence of having consumed some portion of it, the appellant suffered from shock and severe gastro-enteritis. In an action against the manufacturer for damages for negligence,

Held, by the majority of the House of Lords, Lord Atkin, Lord Thankerton and Lord Macmillan (Lord Buckmaster and Lord Tomlin dissenting) that as the manufacturer sent out his goods in

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21. (1894) 2 Q. B. 237.

an opaque container as not to be open to intermediate inspection by the distributor or retailer, a proximate relationship resulted between the consumer and the manufacturer, and a legal duty arose on the part of the manufacturer to the consumer to take reasonable care that the article was free from defect likely to cause injury to health.

HOLDER *v.* COMMISSIONERS OF INLAND REVENUE, (1932) A. C. 624.

Income-tax—Income-tax Act, 1918, S. 36—Interest payable on an advance from a bank—Guarantor of the advance paying it up—If guarantor entitled to deduction of income-tax.

The appellants were interested in a company which had for many years been indebted to its bankers. The appellants guaranteed the advances to the company by the bank and finally paid the bank the amounts due under the advances, of which a large sum represented the interest due on those advances. The appellants then claimed repayment of the tax on the amount of interest under S. 36. S. 36 says that " where interest payable in the United Kingdom on an advance from a bank carrying on a *bona fide* banking business in the United Kingdom is paid to the bank without deduction of tax out of profits or gains brought into charge to tax, the person by whom the interest is paid shall be entitled, on proof of the facts to the satisfaction of the special commissioners, to repayment of tax on the amount of the interest."

Held, that interest payable on an advance from a bank means interest on an advance made to the person paying. The guarantor does not pay on an advance made to him, but pays under his guarantee. In paying the amount of the indemnity, the guarantor cannot be said to be paying interest to the creditor, though he is making good the loss of interest. S. 36 only relates to the person who has obtained the advances, and not to a guarantee, who in paying the amount of interest, does not pay interest to the bank within the meaning of the section.

WINNIPEG ELECTRIC COMPANY *v.* JACOB GEEL, (1932) A. C. 690.

Negligence—Canada (Manitoba Motor Vehicle Act), S. 62—Motor accident—Onus of proof—Evidence all on defendant's side—Judge, if can withdraw the case from jury.

W, the respondent, was sitting in the rear seat of an open touring car which was held up for a moment at a street-crossing by traffic signals. While so stationary, the car was heavily run into

from behind by the appellant's motor omnibus. *W* sustained serious injuries. In an action for damages, the defendant let in evidence on the issue of negligence which the defendant contended was all one way and preponderating and that the Judge ought to have withdrawn the issue from the jury.

Held, that under S. 62 "when any loss, damage or injury is caused to any person by a motor vehicle the onus of proof that such loss, damage or injury did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle, and that the same had not been operated at a rate of speed greater than was reasonable and proper having regard to the traffic and use of the highway or place where the accident happened, or so as to endanger or be likely to endanger the . . . . . . , shall be upon the owner or driver of the motor vehicle." Apart from the section, a plaintiff claiming damages for personal injury in a running down case would have to prove (*i*) that he was injured, (*ii*) that his injury was due to the defendants' fault, and (*iii*) the fact and extent of his loss and damage. In virtue of this statute, he need only establish the first and third elements. The onus for the second is on the defendant, which cannot be displaced merely by the defendant giving some evidence that he was not negligent, if that evidence, however credible, is not sufficient reasonably to satisfy the jury that he was not negligent. The Judge could not have withdrawn the case from the jury because the plaintiff tendered no evidence of negligence; and notwithstanding one-sided evidence, the jury had to decide the issue.

Stanley v. *National Fruit Co.*, (1929) 24 Sasket L. R. 137, approved.

Carnat v. *Mathews*, (1921) 16 Alberta L.R. 275, not approved.

In re HORNE'S SETTLEMENT: COUTTS AND COMPANY *v.* DUCHESSA DUSMET DE SMOURS, (1932) 2 Ch. 180.

Bankruptcy—Settlement—Divorce—Covenant by husband to pay an annuity to the wife in lieu of alimony—Restraint upon anticipation during coverture—Dividend payable—Arrears of annuity—If can be paid to the wife.

By a settlement deed, dated 1st July, 1925, the husband covenanted with his first wife to pay her during their joint lives an annuity of 3000*l*. per year for her separate use without power of anticipation during her coverture. This was on dissolution of her marriage with the husband. In 1929 the husband became a bankrupt and the trustees under the settlement proved in the bankruptcy for the capitalised value of the annuity. The proof was admitted and

2333*l*. was declared as the dividend payable to the wife, treating her as a creditor of the estate. There was due for arrears of annuity 1043*l*.

Held, that the annuitant as the creditor of the bankrupt covenantor was the only person entitled beneficially to the dividend. To the extent of the arrears, it would be part of her estate. The restraint on anticipation or alienation might attach to any excess of the dividend over the arrears for the time being due to the annuitant, but, inasmuch as there were already arrears to an amount greatly in excess of the moneys in the hands of the plaintiffs, there was no ground for retaining any part of the 1043*l*. and it must be paid to the wife.

In re *Bown,* (1884) 27 Ch. D. 411, followed.

In re NATIONAL BENEFIT ASSURANCE COMPANY, LIMITED, (1932) 2 Ch. 184.

Estoppel by representation—Insurance Company—Reinsurance policy—Indorsement of guarantee by another company printed on top of policy—Both companies represented by same chairman, managing director, and underwriter—No evidence of formal contract of guarantee—If can plead absence of contract.

In 1921 and 1922 N. M. Company, issued to the London Company seven marine reinsurance policies, upon each of which a claim for loss or damages arose. In winding up of N. M. Co., a small dividend was paid thereon. On top of each policy was an indorsement printed in red to the effect that " the due fulfilment of the liabilities arising under this policy is guaranteed by the N. B. Co " There was no evidence of any guarantee of any policies of N. M. having been given by N. B. But the N. B. Co. held a large majority of shares in N. M. Both had the same chairman, same managing director, and the same underwriter. The London Company filed a claim in the winding of N. B. Co., for the balance due.

Held, that in the circumstances N. B. Co., was estopped from asserting that the liabilities were not in fact guaranteed by it. It was well known to all the directors of N. B. that their company was guaranteeing the marine risks of the N. M.

Greenwood v. *Martins Bank,* 45 Times L. R. 607; 1932 W. N. 178, applied.

In re SCIENTIFIC POULTRY BREEDERS' ASSOCIATION, LIMITED, (1932) 2 Ch. 212.

Company—Limited by guarantee—Promoted for encouraging and improving scientific methods of breeding, etc., poultry—Memo-

randum prohibiting payment of remuneration to members of Governing Body—Increase of business—Special resolution to remunerate Governing Body—Jurisdiction to sanction—Companies Act, 1929, Ss. 4, 5.

An association was registered as a company limited by guarantee with the primary object of encouraging and improving the breeding of poultry and promoting the use of better and more scientific methods of breeding, feeding and housing poultry. The memorandum and articles of association prohibited the payment of any remuneration to or the division of any profits among the members of the Governing Body. The business of the company increased and consequently the duties of the Governing Body and the company therefore passed a special resolution altering the memorandum by permitting remuneration of members of the Association and of the council or governing Body of the Association for work done for the Association and an application was taken out to confirm it by the Court under S. 5 of the Companies Act, 1929.

Held, that under S. 5, a company may with the confirmation of the Court, by special resolution, alter the provisions of its memorandum with respect to the *objects* of the company so far as may be required to carry on its business more efficiently. But the alteration sought to be confirmed operates clearly to destroy certain of the essential attributes of the company and to make alterations which are not alterations in respect of the *objects*, but alterations going to the real *constitution* and the fundamental objects of the society.

In re *Society for Promoting Employment of Women*, 1927 W. N. 145, applied.

Incorporated Glasgow Dental Hospital v. *Lord Advocate*, 1927 S. C. 400, distinguished.

In re LADD. HENDERSON *v.* PORTER, (1932) 2 Ch. 219.

Construction—Will—Appointment by will to husband—"To the intent that this my will shall take effect whether I survive or predecease my husband"—Husband predeceasing wife—Whether the appointment survives to husband's executors or lapses.

When the husband was alive and she had no children, a wife, who was of illegitimate birth, made a will exercising the power of appointment she had under the marriage settlement, in favour of her husband. The will did not contain any residuary clause or deal with any property other than that comprised in the settlement. The will added the clause " and to the intent that this my will shall take effect whether I survive or predecease my husband". The husband predeceased her and the wife died without revoking this will.

Held, that the husband, the donee of the appointment by will having died, the appointment would normally be ineffective, unless there be in the will a clear intention that it shall not lapse and pointed out to whom the gift is to go in the event of the donee's death. Such person may be a stranger or even the appointee's executors or administrators. The words "to the intent that this my will shall take effect, whether I survive or predecease my husband" were not enough to spell out an effective intention that her husband's estate should take the benefit of the bequest in case he were to predecease her. The appointment, therefore, lapsed and did not take effect.

In re WITHALL. WITHALL *v.* COBB, (1932) 2 Ch. 236.

Will—Charitable bequest to Margate Cottage Hospital—Change of Site and name of the Hospital to the knowledge of testatrix—If bequest of the new hospital.

By her will, dated 22nd September, 1924, a testatrix directed her executors to sell the residue of her property and to pay the proceeds to the Margate Cottage Hospital then in existence.

In 1926 funds were collected and the hospital was removed to another place and enlarged and came to be called " Margate and District General Hospital ". To it was transferred the work of the old hospital, including the medical and nursing staff and the patients. All the investments held by trustees for the Margate Cottage Hospital and the income therefrom were treated by the same trustees as applicable for the new hospital. The testatrix did not change the name of the hospital in the bequest.

Held, it was a valid charitable bequest. The testatrix intended that her residue should be added to the funds dedicated to the purposes of the Margate Cottage Hospital. That means that it should be paid to the persons administering the trusts to which the funds of the Margate Cottage Hospital are dedicated as an accretion to those funds. Question whether the new hospital was identical with the old and entitled to take the bequest left open.

TWYNHAM *v.* BADCOCK, (1932) 2 K. B. 549.

Food and Drugs (Adulteration) Act, 1928—Adulteration by addition of preservatives—Conviction of retail seller after observing the formalities under S. 18—Samples taken and tested from retailer—Prosecution of retailers seller—No fresh samples taken from him—Validity of charge—Public Health (Preservatives, etc., in Food) Regulations, 1925, Art. 7.

A retail seller of ground ginger was charged and convicted for sale of ground ginger adulterated by added preservatives. Before

his prosecution, the Inspector under the Sale of Food and Drugs Acts went through the formalities under S. 18 of the Act, namely, taking of samples from the retailer, dividing them into three parts, delivering one of them to the retailer, then chemically examining the sample to detect the adulteration After the retailer's conviction, the Inspector commenced proceedings against the previous seller under the Public Health (Preservatives, etc., in Food) Regulations, 1925, Art. 7, for selling contrary to the provisions of the Regulations, but did not take any samples again from him or repeat the process. On an objection that the charge was bad for non-observance of the formalities under S. 18 of 1928 Act,

Held, that the regulations do not contemplate that there should be two processes of taking samples, division of the samples and analysis of the samples. They contemplate only that there should be one such process. The case is similar to one where warranty has been relied upon under the Act of 1928 by the retailer.

WEDDELL AND ANOTHER *v.* ROAD TRANSPORT AND GENERAL INSURANCE CO., LTD , (1932) 2 K. B. 563.

Insurance (Motor-car)—Exemption from liability when risk covered by another policy—Meaning of.

The claimant J. R. W. held a motor-car policy issued by the respondents; R. Co., an insurance company, which by Sec. II (A) provided that the company will at the request of the insured treat as though he were the insured any relative or friend of the insured whilst driving such motor-car provided that such relative or friend is not entitled to indemnity under any other policy. The policy further provided that if at the time any claim arises under it, there is any other existing insurance covering the same loss, damage or liability, the company shall not be liable to pay or contribute more than its rateable proportion of the liability. The claimant's brother L. W. W., while driving the car, injured a third party.

L. W. W. also owned a car, in respect of which he held a policy of another insurance company (C. Co.) which contained the following clause:—"*Section L: driving other cars.* The indemnity granted under Section A herein is hereby extended to cover the insured whilst driving any private motor-car not belonging to him for pleasure or professional purposes it no indemnity is afforded the insured by any other insurance". This policy contained no rateable proportion clause. In an action by J. R. W. on his policy, the company pleaded that they were liable only rateably as L. W. W. was insured and had a co-existing cover from his own policy.

Held, that the reasonable construction of the policies was to exclude from the category of co-existing cover any cover which is

expressed to be itself cancelled by such co-existence. To hold otherwise would be to cancel each other, with the result that the loss will be covered nowhere. The correct view will be to hold that the relative or friend is not "entitled to indemnity under any other policy" within the meaning of R. policy, and not 'afforded' indemnity "by any other insurance" within the meaning of the C. policy.

DAMPSKIBSSELSKABET BOTNIA A/S *v.* C.P. BELL AND COMPANY, (1932) 2 K. B. 569.

Shipping—Charterparty—"Weather working day"—Meaning of—Work prevented by ice—If weather working day.

By a charterparty, it was provided that the Steamship *Syndhavet*, belonging to the plaintiffs, should proceed to a port in Finland and there load from the agents of the charterers a full and complete cargo of pit-props at a specified rate of 125 fathoms "per weather working day". On certain days loading could not be done owing to ice. In an action for dead freight by the shipowners against the cargo owners,

Held, that the day on which ice prevents loading will cease to be a weather working day and the cargo owners are therefore exempt from liability under the proviso.

BETTS *v.* RECEIVER FOR THE METROPOLITAN POLICE DISTRICT AND CARTER PATERSON AND COMPANY, LIMITED. (1932) 2 K. B. 595.

Public Authorities Protection Act, 1893—Act done by public officer in intended execution of public duty—Possession taken by officer of goods of plaintiff on suspicion—Goods handed over to supposed owner—Action by true owner—Limitation for claim—Liability of officer.

On suspicion, the police searched the house of J. B., the plaintiff and discovered there some jewels and goods, including 15 rolls of cloth and took possession of them on 12th December, 1924. He was tried and convicted of having received stolen articles, to wit, the jewels. But no evidence was given in support of the indictment relating to the 15 rolls of cloth. On 2nd April, 1925, the police handed over the rolls of cloth to C. P. and Co., who claimed as true owners thereof, after taking from them an indemnity to indemnify the police from claims relating thereto. On 16th January, 1931, the plaintiff brought an action against the Receiver of the Metropolitan Police District and C. P. and Co., claiming damages for detinue, etc. The jury found that the cloths were not proved to belong to the defendants.

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Held, that it is doubtful whether the Act protects a public officer who, while rightly apprehending the facts, takes a mistaken view as to his legal obligations, and executes or intends to execute some function which he has no duty to execute. On the other hand, if a public officer makes an honest mistake of fact and does that which it would be his duty to do if his view of the facts were correct, he is acting in intended execution of a duty within the meaning of the section. When an officer of the Police force comes under a legal obligation to hand to their true owner goods of which he has become possessed in the course of performing his duties to the public, that obligation is a "public duty". Limitation for the claim ran not from the date of demand but earlier and the claim was therefore barred against the public officer.

FARR *v.* BUTTERS BROTHERS AND COMPANY, (1932) 2 K. B. 606.

Negligence—Crane manufacturer—Sale of defective crane—Crane erector working the crane with knowledge of the defects—Death of erector by accident—Liability of manufacturer—Fatal Accidents Act.

The defendants, crane manufacturers, sold a crane to a firm of builders, who had an experienced crane erector in the deceased. The crane was sold in parts. While erecting the crane, the erector noticed certain defects in the crane, that the cog-wheels worked with unusual stiffness and did not fit properly. But he however worked the crane and while it was working it fell on him and killed him. The employee's widow brought an action against the manufacturers under the Fatal Accidents Act.

Held, that the defect in the parts was patent and discoverable, and was in fact discovered by the deceased before he put the crane in operation. Yet he took his chance of operating it without remedying the defect or testing the crane to see whether it would work before putting it into operation. Therefore there was no cause of action for alleged negligence, if there was negligence.

Caledonian Ry. Co. v. *Mulholland*, (1898) A. C. 216, followed.

REX *v.* ALFRED GEORGE HINDS, (1932) 2 K. B. 644.

Criminal Law—Summing up to the jury—Identification parade—Witnesses who had already seen photographs before arrest of the accused—Court if to direct the jury that such evidence was not of much weight.

Certain witnesses, who had prior to the arrest, been shown photographs with a view to ascertaining whether they could pick out

a person not yet in custody so that he might be arrested on suspicion, were called in to identify the accused at an identification parade. In summing up to the jury Avory, J., said: "The law, so far as it is necessary to apply it in this case . . . . is this: that there is no objection to the police who are seeking for information as to the person or persons who may have committed a crime showing to persons who are able to identify the criminal a photograph or a series of photographs to see if they can pick out any one of them which resembles the person whom they think they would be able to identify. What is objectionable is, if a witness has identified an accused person, for the police to try and corroborate the evidence of that witness by showing him or her a photograph of the actual person whom they have already identified."

Held, that this is a sufficient and correct direction and that it is not essential to state that the evidence of these witnesses was less valuable than it would otherwise have been, by reason of their having identified them earlier in the photographs.

Rex v. *Dwyer and Ferguson,* (1925) 2 K.B. 799, distinguished.

JOTTINGS AND CUTTINGS.

Literature in Court.—Since the departure of Lord Darling from Court IV of the King's Bench Division there is a certain dearth of Judges who illumine their dull cases by literary quotations. Maugham, J., is one of those who are not ignorant of non-legal works, but he holds his knowledge in reserve and does not display it even for purposes of humorous relief Both he and my lord Atkin have recently shown their ability to distinguish between the original and the common-place in copyright cases.

Scrutton, L. J., is the Judge who is most given to quotations. In supporting the judgment of the Divisional Court in the *Maloney Case*, he not only helped to enlarge the number of legal definitions, but quoted no less than three works or persons of literary genius in the process: Dean Swift, the Book of Common Prayer, and the Workmen's Compensation Acts. Did the word "sickness" in a contract cover incapacity due to an injured thumb? That was the question. Dean Swift used the word as appropriate to the condition sometime felt on a Channel crossing: "You are sick in the mulligrubs through eating chopped hay". The Prayer Book (in connection with Holy Matrimony) united the spouses in sickness and in health: "sickness" clearly covering a serious injury to the thumb; and the Workmen's Compensation Acts spoke of "sickness benefit" with the same inclusive meaning. The appeal was accordingly dismissed with costs.—*L. J.* 1932, p. 315.

The Prince a Lawyer.—Lawyers will remember that H. R. H. The Prince of Wales, who will soon open the New Parliament Buildings at Stormont, is a member of the Bar, and a Bencher of the Middle Temple. His call, like that of other members of the Royal Family, was quickly done. He became a student, dined, was called and became a Bencher all in the course of an evening in the Middle Temple Hall; thereafter you will find that he ranks first on the list of Benchers of his Inn; with Lord Trevethin, Mr. English Harrison, Lord Parmoor, Sir R. A. McCall and Lord Carson coming next in order. So the Prince and Lord Carson are Benchers of the same House.

Of the other Royal Benchers, His Majesty the King is of Lincoln's Inn, and H. R. H. the Duke of York of the Inner. While Gray's Inn, vey ancient and very remote from the Law Courts, has no less than three Royal representatives: H. R. H. the Duke of of Gloucester, H. R. H. the Duke of Connaught, and H. R. H. Prince Arthur of Connaught.

These Royal Persons do not forget their respective Inns. Not infrequently, especially on Grand Nights, they appear and dine at the high table with other Benchers.—*L. J.* 1932, p. 319.

Young Silks.—One hears sometimes that the giving of silk to a barrister of less than ten years' standing is unprecedented. This is not so. Francis North was called to the Bar in 1661, and after seven years was made a "silk". Sir Samuel Evans, former President of the Probate, Divorce and Admiralty Division in England, was called to the Bar in June, 1891, and was made Q. C. in February, 1901. Benjamin and Sir Edward Carson were also of less than ten years' standing at the English Bar when they became "silks". When Lord Alverstone, C.J., became a Q. C. in 1878, he had just completed his tenth year at the Bar, and Lord Haldane was of eleven years standing. When John Simon, F. E. Smith and Mr. Hemmerde were made "silks" in the same batch in 1908 their united standing at the Bar was less than 30 years. Never before or since have three barristers so junior been included in the same list.

When Francis Bacon, the first Q. C., was reappointed on the accession of James I, he was described as "one of our counsel learned in the law". This phrase is still employed in the K C.'s patent and by Judges when inviting the newly-made leader to take his seat within the bar.—*L. J.* 1932, p. 319.

Importation of Scots Legal Terms.—Every habitue of the Courts is familiar with the growing popularity of the word "implement" signifying to carry out, as, for example, to implement a contract. This is an importation from the vocabulary of the Scots

lawyer, although it seems not to have met with the approbation of linguistic purists. Thus, David Irving, a Scotsman, in his "Elements of English Composition," published in 1841, speaks of the word as derived from "the barbarous jargon of the Scotish (*sic*) Bar," the spelling "Scotish" being a fetish of his own. But the word "implement," which has come to stay, is not the sole importation from the north to creep into the language of our Courts, although it has certainly proved the most popular. Last week in the Court of Appeal Council in the course of his argument quoted a passage from the speech of Lord Haldane in *Port of London Authority* v. *Orsett Union Assessment Committee*, (122 L. T. Rep., at p. 725; (1920) A. C. at p. 286), where that noble Lord said this: "The old dock companies carried on business in order to make profits, and the scheme or the Act of 1908 appears to have been to give their stockholders a surrogatum in the shape of a new stock." This word "surrogatum" excited some interest on the Bench and the Oxford Dictionary was immediately sent for to investigate its history and use, and there it was found to be one of the words derived from Latin which had found acceptance among Scots lawyers, the sole instances of its use being from Scots legal writers, Lord Kames and John Erskine, as meaning something put in the place of another; a substitute. Attention having thus been drawn to a good sounding word it will be of interest to note whether it will have a success similar to that attained by "implement," although this is hardly likely notwithstanding the satisfaction some persons experience when a new word is added to their vocabulary. Lord Dunedin, who is a master of language, gave currency to the word "equiparate," but apparently this has not caught on with English lawyers. "Equiparate" is used by some of the older English writers, but is marked in the Oxford Dictionary as no longer in use. Whether it ever had a vogue at the Scots Bar does not appear, but it has a certain attractiveness and utility.—*L. T.* 1932, p. 388.

The Duties of an Advocate.—We had always thought it an essential part of an advocate's duty to place his client's argument before the Court without himself judging of his merits, except to consider how it should be presented. We make this rather trite observation because of some recent remarks by the Leeds Stipendiary Magistrate in a case in which a local solicitor, Mr. D. I. Sandelson, appeared before him. Mr. Sandelson was, it appears, representing a large motor Company, owning many hundreds of vehicles who had been accused and convicted of permitting two of their drivers to commit certain motoring offences. Pleading in mitigation, Mr. Sandelson stated that his clients had instructed him

that they *were* a careful firm. The learned Magistrate thereupon inquired as to the number of their previous convictions, and learning that they were fourteen in all, declared that Mr. Sandelson should not have accepted these instructions, and that he had failed in his duty to the Court by giving reckless information. To this we would respectfully point out that in the first place, whether or not a person is careful must surely be a matter of opinion, and, therefore, a legitimate subject of argument. Secondly, there was no wilful concealment by the advocate; the facts (the defendant's record) were before the Court, and it was for the Court to decide whether or not it accepted the argument deduced therefrom. Because this ran counter to the view formed by the Court, we find it difficult to understand why the advocate who presented it should have been accused of recklessness and breach of duty. In our view, on the facts as we understand them, Mr. Sandelson seems to have been doing nothing more than his elementary duty to his clients in presenting before the Court the argument on which they wished to rely. So long as an Advocate is, in the memorable words of Lord Chief Justice Cockburn, striving "to accomplish the interest of his clients *per fas*—but not *per nefas*"—we cannot think that the interests of justice are being served by his being rebuked solely because his arguments do not happen to commend themselves to those to whom they are addressed.—*L. J.*, 1932, p. 341.

BOOK REVIEWS.

ON BAIL IN CRIMINAL MATTERS, by M. M. Kotasthane, B.A., LL.B., Advocate, Kalbadevi, Bombay. Price Rs. 1-8-0.

The question of bail in criminal cases has once been much restricted in cases of non-bailable offences. But in 1923 the Select Committee which was appointed to revise the Criminal Procedure Code went into the question and felt that unless the offence was a very serious one the tendency should be to release offenders on bail. Hence some of the changes which were introduced into the Criminal Procedure Code. This little book deals with all the points involved, including the generally intricate problems when questions of remand and further remand arise. Cases both Indian and English are copiously given in order to illustrate the development of the course which has been adopted in the matter of bail grants. The book is useful.

OUTLINES OF CONSTITUTIONAL LAW, by Prof. B. D. Sattigiri, M.A., LL.B. Published by Ramakrishna Brothers, Law Publishers, Poona, 2. 1932 Edn.

In these days of National reconstruction and attempts to establish the Indian Constitution on a fresh basis altogether, it is but

very opportune that books on constitutional law should emerge. But none could be too sanguine to believe that on reading this tiny volume the subject of constitutional law would be mastered. As the author himself confesses, it is only an outline and necessitates the further study of important standard works upon the same theme. We are glad that a perusal of this volume has assured us of its usefulness to students of Colleges who require in a great degree a concise statement of the constitutional law.

BAIL AND RECOGNIZANCE IN CRIMINAL CASES, by B. K. Basu, B.L. 1932 Edn

This is another small publication upon the Law of Bail containing a critical review of the complete case-law of all the High Courts in India. The striking feature of this book is the adequate attention paid to the wants felt hitherto on the subject and the diligent attempt made to satisfy them. Naturally the book is fairly exhaustive.

ELEMENTS OF INDIAN MERCANTILE LAW, by Sohrab R. Davar, J. P. (Bom.), Barrister-at-Law. Sixth edition. Published by Messrs. N. M. Tripathi & Co., Bombay.

It is with pleasure that we welcome the sixth edition of this work within a few years of the appearance of the previous edition. The value of this book has been recognised by those in the line by its being prescribed as a text-book for the students of commerce, accountancy and law for whom it is primarily intended. Since the appearance of the previous edition of this book, several important enactments bearing on mercantile law have been passed by the Indian Legislature, such as the Sale of Goods Act, Partnership Act and some industrial enactments. These have made it necessary for the author to re-write portions of the book and add fresh matter on these subjects. The lucidity of style and the simplicity of treatment of the legal subjects rendering them easily intelligible to comparatively lay readers while not sacrificing any matter of real importance are matters on which the author has to be congratulated. We find that the more important decisions have been noticed in their proper places in the book.

TRIPATHI'S LAWYERS DIARY, 1933. Published by N. M. Tripathi & Co., Bombay. Price Rs. 2.

Both for get up and the useful matter contained in the earlier pages for the lawyer, this diary is highly commendable. One is tempted to possess such a well-sized diary and hardly doubts its attraction for the legal profession.

THE LAW OF MERCANTILE AND LEGAL ARBITRATIONS IN INDIA, by Rai Bahadur Diwan Chand Obhrai. Price Rs. 7.

This a commentary on the Indian Arbitration Act and the provisions of the Civil Procedure Code relating to arbitration. The notes are clear and are given in numbered paragraphs under the various sections and rules. The learned author has avoided discussions and stated the rules as propositions of law and given the decisions supporting those rules in the foot-notes with brief references to the facts of the cases themselves along with their references. The English cases are not referred to as they are not easily accessible in the moffussil. In the preparation of the book, the learned author has availed himself of the information in the leading Indian works on the subject of arbitration. We hope that the book will be found useful to lawyers and Judges.

THE INDIAN PARTNERSHIP ACT (IX OF 1932), by G. R. Jagadisa Sastri, B.A., B.L. Price Rs. 3-8-0.

This is a commentary on the Indian Partnership Act and the learned author has brought out a lucid commentary upon the provisions of the Act giving references to the Indian cases and the leading English decisions in their appropriate places and noting the changes, such as there are, in the law on the subject. The appendices contain information on suits relating to partnerships, mode of keeping accounts and models of partnership deeds.

THE LAYMAN'S LAW GUIDE, by A. C. Sequeira, M.A., LL.B. Price Rs. 3.

This is the first book of its kind, so far as we are aware, in India. This is an attractive little book which has been written for the purpose of guidance for laymen and, as a consequence, as free as possible from technical expressions. To use the author's own words, what has been set out is, speaking generally, a concise statement of the law in most of its obvious branches followed by cases illustrative of its application in a manner best adapted for ready reference. The author assumes no prior knowledge on the part of the reader and he is led from chapter to chapter by the intrinsic interest of the subject. The subjects dealt with are of great variety and interest and we wish the author every success in this new endeavour.

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PANCHAMA TEMPLE ENTRY.

I. THE LEGAL ASPECT.

By P. R. Ganapathi Iyer.

The question of temple entry of what is called the untouchable classes is now engaging the attention of certain minds. It is necessary that this question is discussed in its several aspects and the authorities bearing on the question considered so that it may be seen on what basis the so-called disqualification rests. I am using the word "so-called" advisedly, as before a disqualification can be said to be *real* it must be shown that the *persons* for whom this right of temple entry is now claimed are Hindus following the Hindu religion and that temples such as those existing in Southern India are founded also for the benefit of these people so that they may also be said to be beneficiaries or objects of the trust. Before proceeding to consider the question, it must be admitted that there is no desire, much less any wide desire, on the part of the people for whom the right is claimed to enter these temples; nor is their non-admittance felt to be a grievance by these people or to be an obstacle to their worshipping Hindu Gods if they want to do so.

Unlike Northern India, temples in Southern India are of *two* classes:—(1) those founded on Agama Sastras; and (2) those founded on Tantric Principles. Temples in Malabar are based on Tantric Agamas and the Tantric mode of worship prevails. These will be dealt with last. Most of the temples in Southern India except those of Malabar are based on the Agamas. Temples founded for Siva, His consort, Ganesa and Subramania are mostly governed by the Kamika and other Saiva

Agamas, while a few of them are based on Vaidik worship; while Vaishnava temples are of two classes, *viz.*, (1) those governed by the Vaikhanasa doctrine of worship, and (2) those founded on the Pancharathra doctrine of worship. There are some Swyamboo Lingams in certain Kshetrams and these will be dealt with later on. It is a basic principle of these Agamas that the worship should be in the methods pointed out severally by them and the different castes entitled to, and bound to, worship, together with the way in which they should worship if they want to do so in these temples are also regulated by them. We shall refer to these texts later on. If temples are founded on the principles laid down by the Agamas and the worship is governed by them it is rather difficult to say that these Agamas should be followed as regards some particulars of temple worship and not as regards others.

But apart from these, there are certain legal principles governing these trusts. A *temple* is not a *public* place in the sense in which a *public road* is. This is forgotten by those who plead for the Adi-Dravidas or the so-called Harijans entering temples, the entry into which is prohibited for them except in the case of Melcote in Mysore and some of the Malabar temples. They are open only to the persons belonging to the religious community for whose use and benefit they are dedicated. If others are admitted it is only by sufferance and not as a matter of any right.

In *Venkatachalapathi* v. *Subbarayadu*[1] Muthuswami Aiyar, J., after pointing out that the question in such cases (*viz.*, the right to enter a temple or, as in that case, a particular portion of a temple) was, what was the nature and extent of caste status necessary, according to the usage and recognised trusts of the temple, to the exercise of the right, observed at p. 306:

> "Hindu temples being religious institutions founded, endowed, and maintained for the benefit of those sections of the Hindu community who conform to certain recognised usages as those of the castes for whose benefit the temples are by immemorial usage dedicated as places of worship, persons who conform to those usages stand to the managers for the time being in the relation of *cestuis que trustent* by reason of an implied contract."

If the question in these cases is for whose benefit the founder (known or unknown) founded these temples, and usage is to be looked into as an index to the founder's intention, in

1. (1890) I. L. R. 13 Mad. 293.

the absence of any endowment deed governing the same, the usages of centuries that these Adi-Dravidas or Panchamas have not been admitted into the inner precincts of the temple will show that the founder never intended these Adi-Dravidas to be beneficiaries of these temples and the fact that Adi-Dravidas might have *darsan* of the God when taken out in procession just like others, such as Moslems, Christians, etc., and *enjoy* such *darsan* can confer no rights on them.

Indeed, it would be a question whether these Adi-Dravidas are Hindus not in the sense whether they are governed by Hindu Law (as that is not the test, *for there are Mahomedans and others governed by* Hindu Law) but in the sense whether they are followers of the Hindu religion which recognises the Vedas, Puranas and Agamas as authoritative. If the Baghavad Gita is to be applied to, as some politically-minded Hindus in their eagerness to bring these Adi-Dravidas to the Hindu-fold want, it is a double-edged weapon. There are only four castes mentioned. If Adi-Dravidas are Panchamas and are not Chandalas, it is certain that, according to the Baghavad Gita which divides Hindus into four castes only, the Adi-Dravidas being *Panchamas* and not *Chandalas*, according to the nationalist opposition leader in Madras, they are not Hindus and their admission into Hindu temples will be outrageous and unjust. If, however, they are Chandalas, who are also specifically mentioned in the Baghavad Gita, they cannot be among the four castes of Hindus whose origin is mentioned in the Baghavad Gita.

Indeed the speech of Mr. M. C. Raja when he came here after the Poona pact and gave an interview to the Press here would show that until this pact the Adi-Dravidas whom he represents were not Hindus but by the Poona pact they became admitted as such. The fact that they have their own Gods, their own temples, their own priests and their own customs will also show that there is much to be said for the fact that they form a class by themselves and not persons governed by what is ordinarily known as Hindu faith. Some of them may form Bhajana parties and sing praises of Siva or Vishnu just as they may take part in the Mohurrum celebrations by Muslims and make vows or offers of *fatiha*, etc., at Mahomedan mosques, dargas, etc. This makes them neither Hindus nor Muslims. The question as to the meaning of the terms " Chandalas " and

"Panchamas," and who these are will have to be dealt with separately.

The matter may be looked at in another way. Hindu temples are open only to those who observe certain caste rules or usages and it is only those who observe such usages that will be entitled to participate in the benefits of temple worship. Certain people, according to usage or according to Agamas, which in this particular have been strictly followed by usage, are not entitled to partake in the worship going on in the temple precincts, though they may be entitled to have *darsan* when God is taken in procession outside the temple precincts. Whether they are entitled to make offerings directly even there, is itself a very doubtful question. The usage being that Adi-Dravidas are not entitled to participate in the benefits of the worship conducted in the inner precincts of the temple or even to *darsān* there and the usage being that even those that are entitled to partake of the benefits are only so entitled if they observe certain caste usages, it is not open to Adi-Dravidas to claim rights of worship just as it is not open to those who do not observe the caste usage to claim rights of worship. The latter, as has been observed by the learned Judge in the Madras case already referred to, are in the position of seceders. It will not be open to the seceders, though they may form a majority, to say that they are entitled to the benefits of the trusts notwithstanding their secession; and if the Adi-Dravidas themselves are not entitled to the benefits according to the presumed intention of the author of the trust, it is not open to others who may be entitled to worship to say that they will admit those thus excluded or those not intended by the author of the trust into its benefits. It is not open to a majority to alter the tenets or principles of a creed much less to an individual person, however eminent he may be, to do so.

In *Attorney-General* v. *Pearson*[1] Eldon, L. C., observed:

"If it turns out that the institution was established for the express purpose of such forms of worship, or the teaching of such particular doctrines, as the founder has thought most conformable to the principles of the Christian religion, I do not apprehend that it is in the power of individuals, having the management of that institution, at any time *to alter the purpose for which it was founded*, or to say to the remaining members '*We have changed our opinions and you, who assemble in this place for the purpose of hearing the doctrines, and joining in the worship, prescribed by the founder, shall no longer enjoy the benefit he intended for you unless you*

1. (1817) 3 Mer. 353 at 400, 401: 36 E. R. 135 at 150.

conform to the alteration which has taken place in our opinions.' In such a case, therefore, I apprehend, considering it as settled by the authority of the case I have already referred to, that, where a congregation became dissentient among themselves, *the nature of the original institution* must alone be looked to, as the guide for the decision of the Court—and that, to refer to *any other criterion—as* to *the sense of the existing majority* would be *to make a new institution,* which is altogether beyond the reach, and inconsistent with the duties and character, of this Court."

Later on, in the same case, the Lord Chancellor (Eldon) observed at page 157:

"I must here again advert to the principle which was, I think, settled in the case to which I referred the other day as having come before the House of Lords on an appeal from Scotland, *viz.*, that if any persons seeking the benefit of a trust for charitable purposes should incline to the adoption of a different system from that which was intended by the original donors and founders; and if others of those who are interested think proper to adhere to the original system, the leaning of the Court must be to support those adhering to the original system, and *not to sacrifice the original system to any change of sentiment* in the persons seeking alteration, however *commendable that proposed alteration may be.*"

The disputes arising from the cases of the various secessions which took place in Scotland have elicited from Courts definite principles governing the subject. The first case of secession was that from the Church of Scotland in 1740. This secession arose merely from a difference of opinion on a particular point; but the seceders still retained the plan of Church government by which the national church was regulated and formed themselves into a church judicatory. The congregation which separated from the established church on the same principle submitted to this judicatory, and among these was the congregation at Perth. By voluntary contributions, they purchased a piece of ground and built a chapel on it. Many contributed by their personal labour, by the use of their carts and horses for so many days, weeks and months and the minister's stipend was paid, repairs made and debts paid off by contributions at the church doors.

There was a further secession among this new party of secessionists in 1745 due to a dispute about the lawfulness of a clause in an oath imposed on persons elected into the magistracy in some of the royal boroughs. The old party (of secessionists) who considered this clause lawful were termed the Burghers. Those who objected to the same were styled as Anti-Burghers. These did not raise any disputes as to the property held by the minister belonging to the Burgher party. There was a fresh secession in 1795 or 1796 in the Burgher party arising out of a dispute respecting the power of the

Magistrate to suppress heresy and other points. The Synod by a majority sanctioned the new doctrines. A majority of the money contributors together with the minister at Perth adhered to the original principles. His assistant, together with a majority of the congregation, adopted the new doctrine and adhered to the Synod. The latter claimed the property in the hands of the minister. The case came before the House of Lords. See *Craigdallie* v. *Aikman*[1]. [This case came again before the House of Lords. *See* (1820) 2 Bligh. 529: 4 E. R. 435, but nothing useful is found in that judgment bearing on the principle discussed here.] Eldon, L.C., observed at p. 606:

"With respect to the doctrine of the English law on this subject, if *property was given in trust for A, B, C,* etc., forming a congregation for religious worship; if the instrument provided for the case of a schism, then the Court would act upon it; but as there was *no such provision* in the instrument, and the congregation happened to divide, he did not find that the law of England would execute the trust for a religious society, at the expense of a forfeiture of their property by the *cestui que trusts*, for *adhering to the opinions and principles* in which the congregation had originally united. He found *no case* which authorised him to say that the Court would enforce such a trust, *not for those who adhered to the original principles of the society, but merely with a reference to the majority*; and much less, if those who changed their opinions, instead of being a majority, did not form one in ten of those who had originally contributed; which was the principle here. He had met with no case that would enable him to say, that the adherents to the original opinions should, under such circumstances, for that adherence forfeit their rights."

The next dispute which came before the Courts was that arising in consequence of the formation of the Free Church. There was a Scotch Church in Liverpool established on the principles of the Church of Scotland. There was a deed of trust by which the property was vested in trustees to be used as a place of religious worship "according to the ordinances, rules and forms of the Church of Scotland," and a conveyance was made of the land and premises to the trustees to be for ever thereafter appropriated and used as a place of divine worship, according to the doctrine and discipline of the Church of Scotland. Subsequently a Lancashire Scottish Presbytery as formed to which the Liverpool congregation united, and all the Scotch Presbyteries in England united themselves in 1836 into a Synod which Synod complying with certain conditions was recognised in 1839 by the General Assembly of the Church of Scotland. In 1843 certain ministers and members of the Church of Scotland seceded from the Established

1. (1813) 1 Dow. 1: 3 E. R. 601.

Church; and adopted the name of the Free Church and the English Synod sympathised with the latter and recognised the latter as a Sister Church. The minister of the Church and the trustees in Liverpool co-operated with the seceders and the recognition of the English Synod was withdrawn and the minister was declared to be no longer a minister of the Church of Scotland. Four of the trustees of the Church in Liverpool filed an information and bill that the ministers and trustees who co-operated with the seceders having departed from the original trust should be prevented by injunction from using the Church in Liverpool otherwise than as a place of religious worship in the model of the Church of Scotland as established by law. Although there was a technical point raised by the defendants which succeeded, and the plaintiffs in accordance therewith subsequently were willing to amend their bill, judgment was pronounced on the merits of the motion by the Vice-Chancellor (Wigram) as that was desired by both parties. He observed in *Attorney-General* v. *Welsh*[1] as follows:—

"The grounds upon which this Court is bound to interfere are, *first*, that, by the original contract between the *cestui que trusts*, the Established Church of Scotland was the agreed model upon which the Oldham Street Church was founded; *secondly*, that the Established Church of Scotland has undergone no change, but remains as a model the same as it was in 1799; *thirdly*, that the state of things of which the plaintiffs complain must (if they are right) deprive them of the benefit of the trust until the cause is decided; and, *lastly*, that, according to the defendant's own shewing, there is no practical difficulty in putting things, until the hearing of the cause, upon a footing not obnoxious to the views of either party."

The next dispute which came before the Courts was that in connection with the Free Church. There was a secession from the Free Church and the new body was known as the United Free Church. There was property devoted by persons belonging to the Free Church. Some of the members united themselves with United Presbyterian Church and this United Church was called the United Free Church in 1900. The party of the Free Church who claimed to be the majority and became united with the other body thought that doctrines hitherto held were not in accordance with the true Christian religion. The rest who were stated to be the minority disapproved of the union and continued to profess the old doctrine. The question was whether it was open *to anybody to change, to give up the old faith* and still retain *the benefits intended for those who still believed in*

1. (1844) 4 Hare 572 at 589: 67 E. R. 775 at 782.

the old faith. The House of Lords held that those *who seceded were not entitled to any benefits.* The Lord Chancellor points out that persons or Courts are not entitled to speculate as to what is or is not important in the doctrine held. He (Halsbury, L. C.) observed in *General Assembly of Free Church of Scotland* v. *Lord Overtoun*[1]:

"Speaking generally, one would say that the identity of a religious community described as a Church must consist in the *unity* of its doctrines. Its creed, confessions, formalities, tests, and so forth are apparently intended to ensure the unity of the faith which its adherents profess, and certainly among all Christian Churches the essential idea of a creed or confession of faith appears to be the public acknowledgment of such and such religious views as the bond of union which binds them together as one Christian community. A Court has simply to ascertain what was the original purpose of the trust. My Lords, I do not think we have any right to speculate as to what is or is not important in the views held The question is what were, in fact, the views held, and what the founders of the trust thought important."

He then referred to three cases, one in England, another in Scotland and the third in Ireland, and after quoting from what was said in those cases (by Lord Eldon, Lord Moncreiff and Sir William Cusack Smith respectively) he observed at p. 614:

"The principles for decision thus propounded have been recognised and acted upon ever since, and it would seem that it may be laid down *that no question of the majority of persons can affect the question, but the original purposes of the trust must be the guide.*"

Again, later on, he observed at p. 626:

"My Lords, apart from some mysterious and subtle meaning to be attached to the word 'Church,' and understanding it to mean an associated body of Christian believers, I do not suppose that anybody will dispute the right of any man, or any collection of men, to change their religious beliefs according to their own conscience; but when men subscribe money for a particular object and leave it behind them *for the promotion of that object, their successors have no right to change the object endowed.*"

Again, later on, the Lord Chancellor observed at pp. 627 and 628:

"There is nothing in calling an associated body a Church that exempts it from the legal obligation of insisting that money given *for one purpose* shall not be devoted *to another.* Any other view, it appears to me, would be fatal to the existence of every Non-conformist body throughout the country. Assuming that there are differences of belief between them, those differences are not got rid of by their agreeing to say nothing about them, nor are these essentially diverse views avoided by selecting so elastic a formulary as can be accepted by people who differ and say that they claim their liberty to retain their differences while purporting to join in one Christian Church. It becomes but a colourable union, and no trust fund devoted to one form of faith can be shared by another communion simply because they say in effect there are some parts of this or that confession which we will agree not to discuss, and we will make our formularies such that either of us can accept it."

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1. (1904) A. C. 515 at 612-613.

In the same case, Lord Davey observed at p. 645:

"The question in each case is, What were *the religious tenets and principles* which formed the bond of union of the association for whose benefit the trust was created? I do not think that the Court has any test or touchstone by which it can pronounce that any tenet forming part of the body of doctrine professed by the association is not vital, essential, or fundamental, unless the parties have themselves declared it not to be so. The bond of union, however, may contain within itself *a power in some recognised body to control, alter, or modify the tenets* and principles at one time professed by the association. But the *existence of such a power would have to be proved* like any other tenet or principle of the association."

Again, later on, the same learned Judge observed at p. 648:

"It is, indeed, almost a truism that an unestablished religious association is free from State control as regards doctrine, government and discipline. But that freedom which differentiates a voluntary association from an Established Church is not inconsistent with the adoption by the association of certain tenets which distinguish it from other similar bodies. The right of the Assembly to impose any innovation from established doctrine on a dissentient minority, and the limits of such right (if any) must be found *in the constitutional powers of that body, and must be proved by evidence.*"

James, L. J., in the same case observed at p. 656:

"It is worthy of remark that the Church is not a positive, defined entity as would be the case if it were a corporation created by law. It is a body of men united only by the possession of common opinions, and if this community of opinion ceases to exist, the foundations of the Church give way. But difference of opinion to produce this result must be in respect of fundamental principles and not of minor matters of administration or of faith."

Dealing with this question of what should be regarded as fundamental, the same Lord Justice (James, L. J.) observed at pp. 661 and 662:

"It still has to be considered whether the principle was essential and fundamental or a mere matter of policy It is difficult to define any positive standard between an essential and a non-essential principle But surely there is a great gulf between the principle of Establishment and that of Voluntaryism. It seems to me, having read the declarations of the General Assembly and the distinct utterances of Dr. Chalmers, that scant justice would be done to the eloquent leaders of the secession movement of 1843 if we construed them as treating the Establishment principle as being non-essential or unimportant Still more important is it to consider what was the view of the importance of the principle entertained by those donors who, may be, listened to the appeal of Dr. Chalmers. Would they have regarded it as non-essential? Would they have endowed a Church pledged to Voluntaryism? I think not."

On the argument addressed that the new body left to its members the freedom to differ on the question of Establishment, the learned Lord observed at p. 663:

"But this freedom to differ, whilst admitting the differences, does not lessen or remove them. The United Free Church, as a whole, holds within it neither the principle of Establishment nor of Voluntaryism; such questions were to be open questions. But the man who as a member of the Free Church had accepted the views of a Church which claimed Establishment as

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one of its fundamental principles may well object when he is told that he shall no longer belong to a Church holding that principle, but that he must, under compulsion, join a Church wherein members of it may think as they will on this broad subject, and must, whether he wishes it or not, be in communion with the supporters of the voluntary system to the same extent as if they had been adherents to the principle of Establishment in accordance with the tenets of the Free Church."

Again dealing with one of the reasons of a learned Judge of the Court below that a Church is at liberty to alter its essential principle and yet preserve its identity, the same Lord (James, L. J.) observed at p. 664 :

"From this view I differ, because, regarding 'essential' as meaning fundamental, I do not think that a Church can change such fundamental principles and yet at the same time preserve its identity. As I understood, it was admitted at the bar this power of change is restricted so as to keep the Church within the limits of identity. The retention of the name does not preserve identity, and yet the change of principles might be so great as to leave nothing but the name of the Church."

Then again the same Lord (James, L. J.) observed at p. 665:

"We have to deal *with the rights of property, with the execution* of trusts, and we have to see that the objects the donors had in view are *carried out*. The Church may unite, but if property is sought to be transferred to the new body the identity of that new body—that is the Free Church—after the union must be maintained; and nothing in the deed gives a power to unite so as to bring into existence a Church incapable of identity with the Free Church."

Lord Robertson in the same case before considering the question whether a doctrine is essential or not observed at p. 683:

"I ought to point out that the judgment of Lord Young is wholly rested upon the ground, stated in very sweeping terms, that there is nothing to prevent a dissenting Church from abandoning a religious doctrine, however essential and fundamental, and that an *ex facie* absolute property title cannot be limited by reference, not expressed, to 'the essential doctrines and fundamental pr nciples in the constitution of the Church'. It is unnecessary to say more of this ground of judgment than that it is in flat contradiction of the decision of your Lordships' House in the case of *Craigdallie*, (1813) 1 Dow. 1 (16): 3 E. R. 606."

Later on the same Lord observed at p. 690:

"Regarding the whole of the property now in dispute, I cannot see how, in law or in fairness, a majority of the men who acquired it on the representations made in the affectionate representation could have been allowed, say in 1850, to carry off the property to the Voluntaries and come forward, arm in arm with the Voluntaries, and claim it for the fused body."

Lord Alverstone concluded his judgment in the same case as regards the rights of the minority and those of the majority at pp. 720-721:

"It only remains to consider the position of the appellants and their rights as a minority of the ministers and elders of the Free Church represent-

ing congregations or portions of congregations who are not prepared to join the United Free Church. It is not contended that they have changed their principles; it is not suggested that they have departed from any fundamental or essential principle of the Free Church; it is not alleged that they are not faithfully carrying out the objects of the protest of May 18, 1843. The respondents are threatening to attempt to eject them from their churches and manses, and to deprive them of any right to participate in any funds of the Church, simply on the ground that they decline to become members of the United Free Church. The decisions of the Court of Session in *Craigie* v. *Marshall*[1] and *Couper* v. *Burn*[2], unless overruled by your Lordships' House, are wholly inconsistent, in my opinion, with any such right on the part of the respondents, and I am unable to support a judgment which would deprive the persons *forming a minority of their rights simply upon the grounds that they are unwilling to become members of a body which has not only abandoned a fundamental principle of the Church to which they belong, but supports a principle essentially different from that on which that Church was founded.*"

If this is the principle applicable to churches which are only places where congregational worship is conducted, it will be so *a fortiori* in the case of temples where the theory is that by reason of vivification ceremonies, the God itself is said to preside in the idol located therein. The Madras case already referred to, *Venkatachalapathi* v. *Subbarayadu*[3], applies the principles laid down in the Scotch secession cases.

It cannot be denied that those who think that the Adi-Dravidas are entitled to enter the precincts of a Hindu temple for worship and those who think that they are not so entitled differ on a fundamental basis. The former think that the fundamental basis of Hindu Religion recognises no such disability on the Adi-Dravidas to enter temples while the latter fervently believe that the fundamental basis of Hindu Religion recognises that the entry of the Adi-Dravidas into temples would be a sacrilege and that the effects of the vivification ceremonies by which the Deity becomes incarnate in the idol are gone and the *pratishta* ceremonies have to be gone through again after purification.

It will be seen from the cases already referred to that only those who adhere to the doctrines and faith established and practised from the time a church or temple is founded are entitled to the benefits of the temple and to perform the worship therein; that unless there is an authority recognised in the original foundation of the trust or the original constitution to change the doctrine or faith which should be strictly proved, it

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1. 12 D. 523. 2. 22 D. 120.
3. (1890) I. L. R. 13 Mad. 293.

is not open to the followers of a faith even though they might form a majority to change so as to make their views binding on the minority and that those who dissent from such doctrines and hold different opinions are like dissenters or seceders, who are not entitled to the benefits of the original trust. Those who want a change may have their views enforced in new temples built or founded by themselves. Indeed, according to the Hindu Religion, no one, not even the king, has the authority to change or alter the principles inculcated in the sacred books. The trustees of existing temples will be guilty of a grave breach of trust if they side the seceders and do not adhere to the existing usage. Indeed this is the common law of Hindu religious endowments and this is also the English, Scotch and Irish laws. According to the Privy Council, in all cases of religious foundations or establishments, such as temples, usage is the only guide. It is the usage of each temple that has to be looked into and trustees are bound to observe those usages. It is a breach of trust for the trustees to convert the temples of which they are trustees into any other form of worship. The Madras Hindu Religious Endowments Act makes no new law. It only recognises the existing common law of India and the law and the usage of these temples. The repeal or omission of that section in no way will affect the law, unless the legislature, contrarv to all notions of the law of trusts recognised by civilised countries, declare that trustees may commit breaches of trust with impunity or that those who conscientiously believe that the worship hitherto observed by them is the right one should, under pain of forfeiture of their rights, follow the new methods. Such a course will be the negation of all law and operate as a forfeiture of property. It may as well be said there are here some persons with plenty of money. They have no right to possess so much but must part with a major portion of it to persons who are in want. A resolution in the Council may be passed that these persons who possess such surplus should part with it voluntarily to their less fortunate brethren. If they do not do so, an Act will be passed that the taking of the surplus from such person is no wrong civil or criminal.

The Satyagrahis headed by Mahatma Gandhi openly declare that they do not care what the law is and whether the trustees if they disobey the law are guilty of a breach of trust and are liable to answer for such breach in Courts. It is hoped that

the law of trusts will not be different when the Swarajya constitution functions. When such constitution comes, is a trust for the benefit of particular classes of people not to be given effect to, and will it be extended to others not comprised in those classes; and is a trust to *A*, *B*, *C* not to be given effect to but will be deemed to be a trust for *A*, *B*, *C* and others, and the beneficiaries mentioned by the author of the trust have no choice left but must submit to a majority among them or even outside majority?

One would have thought that these Satyagrahis arrogate to themselves the role not merely of revealers of divine wisdom and religion but also that of law-givers. But the statement of their leader Mahatma Gandhi shows that while inviting them to break the laws he, in his great wisdom, will listen to no plea and that these poor trustees must themselves find out the means how to remove the legal obstacles and if they cannot, it was no concern of the Satyagrahis. Surely this is nothing but a negation of all law and order apart from the fact that they are oblivious to and shut their eyes to others' difficulties in their supposed call for divine light; and no society can exist for a single day which can tolerate such negation of the essential principles which alone can keep society together.

One can understand if these so-called religious reformers will sacrifice some iota of their money or moneys' worth and establish foundations based on the new doctrines they propound, if they have any faith in them and attract even the so-called sinners to such foundations. No, they want to have cheap methods of propounding their faith.

The temple of Sri Rama mentioned by Mr. Kesava Pillai where Adi-Dravidas worship or officiate is an instance where the founder has made the Adi-Dravidas beneficiaries.

It does not concern the reformers in the least whether it is not contrary to the terms of the deeds of foundation or not contrary to long-standing usages from which the terms of the foundation are inferred in the absence of a deed and whether they deprive people of the benefits which they are entitled to, for adhering to the doctrines for which the founder established the foundation. Of course, as already stated, it is no concern of theirs that the trustees by supporting them are guilty of grave breaches of trust for which the Courts will find them guilty and hold them responsible.

SUMMARY OF ENGLISH CASES.

MIDLAND BANK, LIMITED *v.* RECKITT, (1933) A. C. 1.

Banker—Solicitor and client—Power of attorney by client to solicitor—Authority to draw cheques on client's purpose on client's account—Solicitor drawing cheques but paying into his own Bank for his own private purposes—Liability of rece ving bankers—Negligence—Bills of Exchange Act, S. 82.

T, a solicitor, had a client *R*, who, as he was obliged to be abroad, gave a power of attorney to his Solicitor *T* empowering him to draw cheques upon *R's* banking account and to apply moneys for the purposes of *R*. *T* to *R's* knowledge acted under the power often. *T* signed the cheques on books supplied by *R's* bank *B* at the cost of *R*, signing the cheques on the impression made by a rubber stamp containing in the upper line " *R* by " and on the lower line " his attorney " and placing his signature between the lines, so that the completed signature on each cheque ran as " *R* by *T*, his attorney". *T* drew cheques like this and paid them into his own account with the *M* bank (defendants). He had an overdraft with the *M* bank and as it was much overdrawn, the bank insisted on his covering the overdraft. *T* paid in by this fraudulent means by cheques drawn on *R's* account. In an action by *R* against *M* bank for damages for conversion of the cheques, *M* bank relied on S. 82 of the Bills of Exchange Act and pleaded that they had received payment of the cheques (crossed) in good faith and without negligence.

Held, that the onus of proving the absence of negligence is plainly upon the bank. They had notice in the form of the cheque that the money was not the money of *T* but of *R*. In the omission of an ordinary business precaution, in breach of a plain duty imposed upon a creditor to take reasonable care to see that a known agent, who is paying his own debt out of his principal's money is acting within his authority, the bank were negligent in making no enquiry as to their customer's authority to make these payments and S. 82 did not avail the bank.

Lord Reading, C. J.'s reading of S. 25 of the Bills of Exchange Act in *Morison's case*, (1914) 3 K. B. 356, disapproved.

Reckitt v. *Barnett, Pembroke & Slater, Ltd.*, (1929) A. C. 176, applied.

The clause in the power of attorney that the principal " ratifies and confirms and agrees to ratify and confirm whatsoever the attorney shall do or purports to do by virtue of these presents " cannot help the bank. A ratification in advance seems to contradict the essential attributes of ratification. It cannot be construed as extending the actual authority given by the power of attorney; it

may amount to a promise to adopt acts done within the ostensible authority.

CELLULOSE ACETATE SILK COMPANY, LIMITED *v.* WIDNES FOUNDRY (1925), LIMITED, (1933) A. C. 20.

Contract—Penalty and liquidated damages—Measure of damages fixed by contract—Inadequacy of damages—If can be gone into.

A contract for the erection of an acetone recovery plant provided that the plaintiffs were to deliver and erect the plant in 18 working weeks from receipt of final approval of their drawings and further provided that if this period of 18 weeks was exceeded, the plaintiffs were "to pay by way of penalty the sum of 20*l.* per working week" over and above the 18 weeks, subject to events beyond their control. The plant was not installed in time but was done only 30 weeks later. The plaintiffs claimed the contract price and the defendants counter-claimed for the delay and claimed the actual loss they had suffered.

Held, that what the parties meant was that in the event of delay the damages and the only damages were to be 20*l.* a week, no less and no more. It must have been obvious to both the parties that the actual damage would be much more than 20*l.* a week, but it was intended to go towards the damage and it was all the sellers were prepared to pay. The plaintiffs were therefore liable to pay 600*l.* only as liquidated damages.

GREENWOOD *v.* MARTINS BANK, LIMITED, (1933) A. C. 51.

Estoppel—Husband and wife—Joint account in bank—Forged cheques by wife paid by bank—Husband getting to know of the forgery—Silence for some time till wife died—Loss of remedy to the bank against forger—Husband if entitled to money.

A husband opened with the *M* bank a joint account in the name of himself and his wife. It was arranged with the bank that cheques on this account should bear the signatures both of the husband and of his wife. The husband also had a separate account. The wife had forged her husband's signature and drawn out moneys from the bank without the husband's knowledge. In 1929 the husband came to know of it but at the request of his wife, he kept quiet without informing the bank of it. Some months later the husband threatened to inform the bank, whereupon the wife committed suicide. Thereupon the husband sued the bank for the amount that they debited him with on the forged cheques.

Held, that the husband owed a duty to the bank to disclose to the bank the forgeries as soon as he discovered it, that by his silence he has deprived the bank of their right to sue the wife in tort and on which the husband himself would have been responsible as for his wife's tort. The silence until after his wife's death amounted in these circumstances to a representation that the cheques were not forgeries and deprived the respondents of their remedy.

PRONEK *v.* WINNIPEG, SELKIRK AND LAKE WINNIPEG RAILWAY COMPANY, (1933) A. C. 61.

Negligence—Railway Company—Level crossings—Preferential right to run cars on highway by statute—Extent of—Duties to public.

A railway company incorporated by special Act of the legislature of Manitoba had a preferential right of way for all their cars and trains on the tracks and highways and any vehicle, horseman or foot passenger should, on the approach of any car, give the car right of way. The cars running after dark should be provided with signal lights to be conspicuously displayed thereon. The appellant sustained injuries while returning home at 7 P.M. The horses taking fright ran at full gallop and a company's car with a dim light on ran into it from behind.

In an action for damages,

Held, that the statutes gave the company the right to lay and operate the track, but the members of the public continued entitled to use that part of the highway, though the company had a preferential right in the sense that, on the approach of a car, other users of the highway were to give the car "right of way". But that did not involve that the cars were to be driven in disregard of other users of that part of the highway. The company were under a legal duty by their servants to be on watch for the safety of the people on the track and to equip the car with lights adequate at night to enable the driver to stop in time to avoid wayfarers. There was a reciprocal duty to take reasonable care to avoid the car and not to be guilty of contributory negligence. The appellant was lawfully on the highway and was neither a trespasser, nor a mere licensee, nor was he there at his own risk. The appellant was not guilty of contributory negligence and was entitled to damages.

VANDEPITTE *v.* PREFERRED ACCIDENT INSURANCE CORPORATION OF NEW YORK, (1933) A. C. 70.

Insurance Act (British Columbia), 1925, S. 24—Motor car—Insurance—Car driven by third party with owner's permission—

Third party risk—Indemnity in favour of owner—Availability of to drivers with owner's permission—Unsatisfied judgment against driver—Action against insurer for the same—Defence of original action by insurer—If estops insurer.

V sustained injuries owing to the motor car in which she was a passenger being involved in a collision with a motor car driven by *J. B.*, daughter of *R. B.* She (*J. B.*) was driving the car with her father's permission. *V* brought an action against *J. B.* for damages and obtained judgment. Execution was issued against *J. B.* but it was returned unsatisfied. *R. B.* had insured with the respondent company in respect of the car and they had taken over and conducted the defence of the action against *J. B.* The policy indemnified the insured against third party risks and the indemnity was also available to any person while riding in or operating the car with the permission of the insured. *V* claimed to recover the unsatisfied judgment debt from the Insurance Company on the grounds that within the meaning of S. 24 of the British Columbia Insurance Act, *J. B.* was the insured inasmuch as the indemnity was available to her and in any case the company was estopped as by conducting the defence of the suit, they recognised *J. B.* as the insured.

Held, R. B. never made the contract of insurance as *J. B.'s* agent. In any event unless it is established that the person who directed the insurance to be effected (*R. B.*) actually intended to cover that particular person (*J. B.*), no one can claim the benefit of the clause indemnifying any person operating with owner's permission. There was no evidence that *R. B.* had any intention to insure any one but himself. Even if he had so intended he had no authority from *J. B.* to insure on her behalf and at no time did she purport to adopt or ratify any insurance even if made on her behalf. She cannot therefore be deemed in law 'insured' under the policy. In any case provisions of S. 24 would not be satisfied by anything but a contract at law, enforceable directly against the insurers by the insured in her own name. As for estoppel, even assuming that by conducting the defence, they can be said to have admitted *J. B.* was the insured, that would not benefit *V*, because she was no party to such an estoppel.

N.B.—S. 24 runs as follows:—" Where a person incurs liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against him in respect of such liability, and an execution against him in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the

policy, but subject to the same equities as the insurer would have if the judgment had been satisfied."

CIPRIANI *v.* BURNETT, (1933) A. C. 83.

Trinidad—Contract—Sweepstake—Decision of Turf Club final—Reference to Turf Club if a condition precedent.

A sweepstake was organised and controlled by a Turf Club in Trinidad affiliated to Trinidad Turf Club. Though a contract for the sale of a lottery ticket was unlawful under Trinidad law, a sweepstake organised by Trinidad Turf Club or an association affiliated to it was excepted. Printed upon the ticket was a condition that in the event of any dispute arising with respect to any matters concerned in the drawing of the sweepstake or the awarding of the prizes the decision of the stewards of the Trinidad Turf Club thereon shall be accepted as final. Upon the drawing, another, other than the respondent, was declared the winner. The respondent claimed that if drawn properly, he should be the winner. He did not allege fraud or want of *bona fides* in the drawing but only objected to the manner of it.

Held, that the dispute between the parties was one connected with the drawing of the sweepstake, etc. and the respondent should have therefore gone to the stewards of the Trinidad Turf Club as the special tribunal constituted therefor, and cannot ask the Court to substitute its judgment for that of the stewards. It is not essential in order to exclude a right of action at law that the contract should in terms prescribe that the award of the specially constituted tribunal shall be a condition precedent to any legal proceedings.

A. E. CAMPBELL *v.* T. E. ROFE, (1933) A. C. 91.

Company—Issue of preference shares—Power to conferred by memorandum—No express power under the articles—Vesting of "business of the company" in the directors—Company if can issue preference shares—New South Wales Companies Act, 1899.

In the liquidator of a company incorporated in New South Wales, the liquidator sought to place *R* on the list of contributories in respect of 8,000 preference shares allotted to him as part of the original capital by the directors on *R's* application, which was in response to a prospectus issued by the directors offering such shares. *R* disputed the validity of the allotment. There was no resolution of the company creating preference shares. The memorandum of the company conferred the power on the company to issue preference shares but the articles did not expressly confer it.

But Art. 10 provided that " the shares shall be under the control of the directors who may allot or otherwise dispose of the same to such persons on such terms and conditions as it thinks fit . . . ", and Art. 117 vested 'the management of the business of the company' in the directors.

Held, that with regard to this issue the New South Wales Law is the same as the English Company Law of that period (1899). In the absence of any article clearly restricting the company in that respect, the company is entitled to exercise the powers expressly conferred on it by the memorandum. Art. 10 includes the power to control the character of the shares. If Art. 10 should be read as not conferring that right, then Art. 117 clearly delegated to the directors power to do everything that the company could do except where the authority of a general meeting of the company is expressly prescribed, and that such delegation would include power to issue preference shares.

OLIVER *v.* BIRMINGHAM AND MIDLAND MOTOR OMNIBUS COMPANY, LIMITED, (1933) 1 K. B. 35.

Negligence—Infant—Crossing road with grandfather—Negligence of grandfather—Negligence of omnibus driver—Right of infant to damages.

At about 10-30 P.M., an infant aged 4 years, was crossing a road with his grandfather, who was holding his hand. When in the middle of the road, the grandfather was startled by the defendant's omnibus, released the infant's hand and jumped aside. The child was struck by the omnibus and injured resulting in the loss of four fingers on the left hand. In an action by the infant for damages for injuries caused by the negligent driving of the omnibus, it was found that the driver was negligent in not giving proper warning but that the grandfather was guilty of contributory negligence.

Held, that the negligence of the grandfather was no bar to the infant's claim and that the infant cannot be so identified with his grandfather, who was in charge of him, as to make grandfather's negligence, his own.

Waite v. *North Eastern Railway Co., E.*, B and E. 719, must be regarded as overruled since the decision in *Mills* v. *Armstrong, The Bernina*, 13 A. C. 1, which expressly overrules *Thorogood* v. *Bryan*, 8 C. B. 115.

WINDRIDGE *v.* ANCIENT ORDER OF FORESTERS FRIENDLY SOCIETY, (1933) 1 K. B. 42.

Friendly Societies Act, 1896—S. 84 (c)—Making false return —What is—Making of a false document—If complete offence before sending the return to the Registrar.

The crucial date is not the date when the signatures on the return were affixed in accordance with the internal rules of the society. It may well be that at that time there was some offence committed and that it was a continuing offence. But the particular offence of making a false return is only complete when the return was sent to the Registrar. Before that, it is only a preparation of the return and not making a false return.

REKSTIN *v.* SEVERO SIBIRSKO GOSUDARSTVENNOE AKCIONERNOE OBSCHESTVO KOMSEVERPUTJ AND THE BANK FOR RUSSIAN TRADE, LIMITED, (1933) 1 K. B. 47.

Banker and customer—Order by customer to transfer his account to another—Account transferred—Garnishee order on bank after transfer but before notice of it to transferee—If valid.

R obtained a decree against *S* for 2500*l* in 1931. *S* had a balance at the Russian Bank of over 9000*l* at that time. Somedays after the decree. *S* wrote a letter to the bank to transfer the amount to his credit to a delegation of Soviet Socialist Republics, a body having diplomatic immunity from legal proceedings. This order of transfer was never revoked by *S* and no debt was owing from *S* to the delegation. Before the bank could serve the notice of transfer on the delegation, *R* served on the bank a garnishee order nisi. The Bank contended that as they had transferred the account, there was no balance to *S* account, on which the garnishee order could operate.

Held, that at the time when the garnishee order was served on the bank, the bank must be regarded as still holding the credit balance for the use of *S*, and there was a debt due from the bank to *S* as their customer. What was done by the bank was mere internal machinery for recording what was to be done by the bank on the instructions of *S* and that there could be no effective transfer of the customer's money until the proposed transferees had received notice of and had assented to the moneys in question being transferred to them. The bank's closing the account is not sufficient to bring to an end the relationship between the bank and *S*. The power to *S* to revoke the direction to transfer was still in existence when the garnishee order was served.

Roberts v. *Jones*, 61 L. J. Q. B. 523 distinguished and doubted.

Joachimson v. *Swiss Bank Corporation*, (1921) 3 K. B. 110 followed.

THE KING *v.* MIDDLESEX JUSTICES. EX PARTE BOND, (1933) I. K. B. 72.

Res judicata—*Husband and wife—Petition by husband for divorce—Wife appearing but not defending—Decree absolute—*

Subsequent application by wife before Court of Summary jurisdiction for custody and maintenance of children—Return of application to be presented to Divorce Court—Filing of application before Divorce Court—Objection to jurisdiction of Divorce Court.

The parties were married in 1919 and a girl was born to them in the end of 1920 and another son in 1923. In 1930 the husband filed a petition for divorce. The wife entered an appearance but did not defend the suit and the decree was made absolute. Then the wife made, in 1931, an application to the justices under the Guardianship of Infants Acts, 1886 and 1925 for custody and maintenance of the children but the justices referred her to the Divorce Court. The wife then made the application before the Divorce Court and the Court ordered the application. The husband then sought to quash the order by a writ of certiorari.

Held, that whether regarded as a refusal by the justices to make an order, from which the wife did not appeal, or as a decision that the matter was one which would more conveniently be dealt with in the High Court, the order was *res judicata* and the Divorce Court has jurisdiction.

(Per Lord Hewart, C. J. and Avory, J.) that under S. 193 of the Supreme Court of Judicature (Consolidation) Act, 1925, the jurisdiction of the Divorce Court in these matters is an overriding jurisdiction and even if the justices made an order, there is nothing to prevent the husband from going to the Divorce Court the next day and asking for a contrary order.

Per *du Parcq, J.*—" I am not entirely satisfied that the jurisdiction of the Divorce Court is exclusive".

JOTTINGS AND CUTTINGS.

Lord Sankey on Legal Education.—On Tuesday of the present week the Lord Chancellor (Lord Sankey), representing the Crown as Visitor of Downing College, Cambridge, opened four new blocks of living rooms and a pair of wrought-iron gates, the gates having been presented by Professor Kenny's daughters as a memorial of their late father. In the course of a very thoughtful and considered speech Lord Sankey had a good deal to say about legal education. He had always taken a profound interest in the subject, as he felt that the higher the standard of legal education the greater the respect in which the lawyer would be held by the community. His Lordship referred to the Committee he had recently appointed to inquire into our methods of teaching the law, and he expressed the wish that, in a country where everyone was presumed to know the law, some elementary teaching of the subject should be given to

all who would be called upon to guide and direct the destinies of our Empire. He explained that he had appointed the Committee referred to principally because he considered that we were now at the turning point in the history of the Profession. The merely practical lawyer to-day was not all-sufficient. The Courts were now concerned with great social experiments, and law schools must aim at shaping the minds of their students to a critical understanding of the foundations of jurisprudence. The schools had therefore to teach the importance of both stability and change. If, as Mr. Robson suggested in his paper mentioned in a previous paragraph, a real "assault upon authority" is upon us and the principle of *stare decisis* is to be seriously called in question, it is obvious that the methods of legal education will require to be radically changed, and we look forward to the report of the Committee appointed by the Lord Chancellor for valuable suggestions on the subject.—*L. T.*, 1932, p. 243.

Judicial Resignations.—Rumours of judicial resignations are often rife at the end of the Trinity Term, but when the Courts reopen in October they prove as often to be false. This has always been so. It was told of Mr. Justice Wightman, who stayed in the Court of King's Bench beyond the usual span, that at the end of one summer term he announced to his brother judges that he intended to send in his resignation. When the judges reassembled for the Michaelmas term at Westminster Hall, he appeared again hale and hearty. "Why, brother Wightman," said Sir Alexander Cockburn, who was then Lord Chief Justice, "you told us that you were going to send in your resignation to the Lord Chancellor in August." "So I did," said the Judge, "but when I went home and told my wife she said, 'Why, William, what on earth shall we do with you messing about the house all day?' So I was obliged to come down to Court again."—*L. T.*, 1932, p. 250.

Reform of the House of Lords.—This question, which is again to the front by reason of the report of a joint committee of peers and members of the House of Commons, although it is obviously more a political than a legal one, has, nevertheless, an interest for lawyers in view of the House of Lords being the ultimate appellate tribunal for Great Britain and Northern Ireland. In the report to which reference has been made it is not contemplated that the judicial side of the House should be affected in any way, for among the various proposals for improving the *personnel* of the second chamber there is no suggestion that the Lords of Appeal in Ordinary should not continue to be members. A larger infusion of the

legal element might, indeed, be advocated with advantage, and it is permissible to deplore once again the shortsightedness of the Lords when, led by Lord Lyndhurst, they rejected the proposal of the ministry of the day for the creation of life peerages. We have, it is true, life peers now, but they are those only who have been so created under the Appellate Jurisdiction Acts to qualify for the judicial work of the House. In treating of this subject, Bagehot, one of the acutest critics of our political system, said in his classic work on "The English constitution," that in following the advice of Lord Lyndhurst, "the House of Lords rejected the inestimable, the unprecedented, opportunity of being tacitly reformed. Such a chance does not come twice. The life peers who would have been then introduced would have been the first men of the country. Lord Macaulay was to have been among the first; Lord Wensleydale (Baron Parke)—the most learned and not the least logical of our lawyers—to be the very first. Thirty to forty such men, added judiciously and sparingly as years went on would have given to the House of Lords the very element which as a criticising chamber it needs so much." It were well that Bagehot's weighty words were kept in mind in any proposal for the reform of the Upper House; and further, the advantages of a larger legal element quite distinct from the Lords of Appeal (who by the very fact that they are judges wisely abstain from the discussion of purely political subjects) should also be kept in view. This would, of course, involve, in carrying out Bagehot's idea, statutory power being given to create life peers apart altogether from that conferred by the Appellate Jurisdiction Acts.—*S. J.*, 1932 p. 805.

The "Tote" and the Law.—A morning newspaper is responsible for the statement that dozens of "Tote" clubs have recently been established, and dozens more are projected for London and its suburbs. The deduction may be made that the proprietors of these places deem they are within the law, and perhaps the further deduction that, until quite recently, there was no such assurance, otherwise so obvious a source of profit would surely have been long ago exploited. The newspaper suggests that these clubs have come about as the result of a decision to the effect that a "Tote" at a dog-race is not illegal. *No doubt Everett* v. *Shand*, (1931) 2 K. B. 522 (75 Sol. J 323) is indicated. In that case it was held that the "Tote" was not a contrivance for gaming at any game or pretended game of chance within S. 3 of the Vagrancy Act Amendment Act, 1873. The decision was in fact contrary to *Tollett* v. *Thomas*, (1871) L.R. 6 Q.B. 514. *The Divisional Court in Everett* v. *Shand could hardly have over-ruled that in Tollett* v. *Thomas*, but the judges in *Everett*

v. *Shand* held that the House of Lords had impliedly over-ruled the older case in *A.-G.* v. *Luncheon and Spor s Club Ltd.*, (1929) A. C. 400, although no cases are discussed in the judgment, nor was *Tollett* v. *Thomas* mentioned even in the Court of Appeal. The decision in *A.-G.* v. *Luncheon and Sports Club Ltd.*, was on the repealed betting duty, but it was to the effect that the respondents, who had established a "Tote" at the Stadium Club, making only the usual 10 per cent. deduction from the gross takings for expenses, etc., were not betting with the members. Lord Buckmaster appeared to think that the members were betting with each other (p. 405). Lord Blanesburgh doubted it (p. 407). In *Everett* v. *Shand* both Lord Hewart and Humphreys, J., appeared to think that subscribers to a "Tote" betted *inter se*. In neither case, however, was such a conclusion necessary to the decision, and it conflicts with the very definite ruling of Lord Russell in *Ellesmere* v. *Wallace*, (1929) 2 Ch. 1 (see p. 55), that there cannot be more than two parties to a bet. The result appears to be that, in staking money on the "Tote" nobody is betting with anybody else and it is not a lottery, because the prize does not depend on mere chance, but on the choice of a horse. On this reasoning, anybody may lawfully set up a "Tote," and persons may resort thereto and even stake ready money, without infringing the law. If so, it is a fine illustration of the efficacy and coherency of our betting and gaming laws.—*S.J.*, 1931 p. 805.

Chief Justice Marshall.—During recent years one of the most pleasant features in the relations of Great Britain and the United States has been the frequency with which there has been interchange of visits between the distinguished lawyers of each nation. Lord Reading has just returned from his mission of representing the English Bar at the laying of the foundation stone of the new Supreme Court at Washington, and Lord Craigmyle, whom most of us remember better as the bearer of his former title, Lord Shaw, has completed at Baltimore, Washington, New York and Philadelphia his lectures on "John Marshall in Diplomacy and in Law"—a noble theme which he handled in language aglow with admiration, and worthy of the great jurist whose genius he was celebrating. John Marshall became Chief Justice of the Supreme Court of the United States in 1801, and held office till his death in 1835, and during those years it fell to him to secure for the Court over which he presided the decision, in controversies between the States and the central Government, of what is and what is not constitutional. As was said, "he found the Constitution paper and he made it power; he found it a skeleton and he clothed it with flesh and blood." So detached a writer as the late Lord Bryce waxed almost dithyrambic

in his admiration for Marshall and his interpretative work. Little wonder, then, that Americans, as he said, have been wont to regard him as a special gift of favouring Providence. Rarely does it fall to a Judge to leave an impress so indelible on the records of his time. How did he achieve this? The opportunities that came to him were doubtless unique, but the success of his work, as Lord Bryce also pointed out, was due to the fact that he never trod on purely political ground, and never indulged the temptation to theorise, but was content to follow out as a lawyer the consequences of legal principles, so that the Constitution seemed to rise under his hands to its full stature, standing revealed in the harmonious perfection of form which its great framers had designed.—*S.J.* 1932, p. 821.

Exhibits.—On several occasions in recent months Lord Justice Scrutton has called attention to a matter which he regards as one of importance, namely, the frequency with which documents put in evidence in the trial Court have failed to be available when an appeal comes on in the Court of Appeal. There appeared, he said, to be very much greater laxity in the matter of identifying what has been put in evidence in cases in the King's Bench Division than in those tried in the Chancery Division. No doubt it is difficult for those conducting a case in the Court of first instance to prophesy whether there will be an appeal, and therefore whether a particular document should be retained by the Associate or that he should at least ascertain where it may be obtained should an appeal be entered and heard, but there ought to be some more effective method of identifying the whereabouts of Exhibits than obtains at present. In Scotland the procedure in the matter of productions is more methodical than with us. There it appears to be the rule that documents intended to be founded on at the hearing require to be lodged in Court at a comparatively early stage of the litigation, and failure to comply with this rule may entail penalties on the defaulting party. In the case of an appeal being proceeded with copies of all the relevant documents put in at the trial have to be furnished for the appellate Court.—*S.J.* 1932, p. 822.

Hereditary Judgeships.—The appointment of Master Joseph Chitty to be Chief Master of the Chancery Division provides yet another example of legal heredity. His father, of course, was the celebrated Judge whose genial habit of introducing personal recollections into his judicial utterances earned him the nick-name of Mr. Justice Chatty. It was the same Judge who, when the ceiling of his Court crashed down one day, made the prompt comment:

"*Fiat Justitia, ruat caelum.*" The tendency of succession to breed success is very strongly marked at the Bar, as witness the families of Coleridge, Vaughan Williams, Finlay, Thesigar, Pollock, Lush, Channell and Phillimore. Most of these distinguished names constitute an adequate reply to Lord Justice Bowen's cruelly pointed pun, that while some judges take their positions "*per capita.*" others take "*per stirpes*". At the last call to the Bar, a Roche and a Luxmoore figured in the respective Call Lists of the Inns where their fathers are Masters of the Bench. The Coleridges, of course, almost founded a legal dynasty in rivalry to the Pollocks. Then there are the Russels of Killowen, father and son, who reaped between them the laurels of the King's Bench and of Chancery. Charles, J., and Macnaghten, J., also carry on the torch of paternal achievements.—*S.J.* 1932, p. 830.

No Change.—It seems passing strange that so many sexually minded young persons stood their ground in the Divorce Court after Lord Merrivale, P., had observed during a recent case: I notice a lot of young women who seem to take an indecent interest in these indecent discussions. . . . Their own sense of propriety must be their guide as to whether they stay or not." On a somewhat similar occasion, Mr. Justice Maule took a rather more indifferent view of the matter. A witness hesitated to go baldly into some indecent details in a Court crowded with eagerly expectant ladies. "Out with it," said the Judge. "The ladies don't mind and you need not be afraid of me." We are not so very different from our fathers (and, incidentally, our mothers and grandmothers) to judge by a description of the Divorce Court in a Newspaper of 1870. "Far too many ladies crowd the Court and listen unabashed to details the reporters can barely mention." The same article observes that "things are not what they seem in the Divorce Court. As a rule, the feminine petitioners are prettier than the respondents." The writer notes "a curled darling of a man dressed not wisely, but too swell." A co-respondent? No. A petitioner.—*S. J.* 1932, p. 830.

A "Poor Person".—Anther matter was the reappearance as a litigant of Mr. Bottomley, who at one time might have been a Cabinet Minister, and, when a rich man, appeared in person with great distinction and success in many a hard-fought action in the Courts. He was admitted as a poor person under the Poor Persons Rules to prosecute his appeal in *Bottomley* v. *F. W. Woolworth & Co., Ltd.*, The defendants made an unsuccessful application to the Court of Appeal for security for costs. Under the rules when once a

certificate has been granted to a litigant to appear as a poor person, he cannot be made liable for costs.

So Scrutton, L J. ., in delivering the unanimous judgment of the Court dismissed the application, indicating at the same time that the applicants were not wholly unprotected. They could move to "distransfer" the appellant under Order XVI, rule 29; and on such an application it was open to the Court to consider not only the question of means but also whether there were reasonable grounds for the appeal. But so long as the certificate stood the Court had, clearly, no power to make an order for security for costs.

So Mr. Bottomley was held to be entitled to all the advantages of a poor person litigant; probably the most distinguished person who has yet taken advantage of the Rules.—*L J.* 1932, p 442.

Napoleon and Codification—During the Napoleonic war and while, consequently, feeling in this country was intensely bitter against the head of the French nation, Thomas Campbell, the poet, at a literary dinner, startled the company by proposing the health of Napoleon. When the first marks of disapprobation had subsided, Campbell dissolved their anger into laughter by addding, "You must remember that he shot a bookseller!" Lawyers, and chiefly, of course, French members of the Profession, may well in imagination render tribute to the memory of Napoleon as their great law-giver. The project of unifying the innumerable varieties of local laws and customs which overspread the country suited his genius for order, and to the lawyer's mind nothing is so distasteful as disorder in the domain of law, and so the Code Napoleon, prepared by the commission he set up, has proved an inestimable boon to France. Naturally, the lapse of time has wrought changes in the life and thought of the country, and have necessitated changes in the Code, but this was inevitable and in no way detracts from the brilliancy displayed by those employed to carry out the work. During its progress Napoleon took a deep interest in the undertaking, and is said to have made many useful suggestions for its improvement. So proud was he of it that he declared that his name would live not by his military exploits but by the Code which bears his name. It can hardly be said that this prophecy has heen wholly realised. To many men the glamour of his battles completely overshadows the peaceful and more beneficent work of reducing the legal chaos into order and precision, but to the lawyer, who cares greatly for clarity and precision in law, he will ever be remembered as one of the greatest benefactors of his race. Truly he built well when he built up the Code Napoleon.—*L.T.* 1932, p. 510.

Lawyers as Witnesses.—In a case which was before the Court of Appeal recently attention was drawn to the evidence give by one of the witnesses who happened to be a member of the legal profession, and the members of the Bench noted with some amusement that a great part of what was said by the particular witness consisted of animated speeches instead of mere answers to the questions put to him. This circumstance led Lord Justice Scrutton to remark that legal witnesses were prone to this, instancing Lord Chancellor Selborne whom he had heard on one occasion giving evidence which consisted chiefly of irrelevant statements. This tendency has long been a matter of comment. Lerd Campbell remarked that most men who are accustomed to appear before the public, when examined in a court of justice, make the worst witnesses, and he recalled that Garrick, who in one case was called to explain what "free benefit" is, could only say that a "free benfit is a free benefit", an explanation which was certainly not illuminating. Erskine, afterwards the Chancellor, was another who did not shine when in the witness box. When called to give evidence on behalf of Arthur O'Connor on his trial for high treason, we find that again and again the Attorney-General intervened to protest against the speeches which Erskine would insist on giving irrespective of their relevancy; and Campbell adds that there was much tittering in Court "by this egotistical garrulity". As an advocate, Erskine was *facile princeps,* as a witness he "floundered," which he did "in honour of his hosts", as Jekyll wittily put it, when he stammered and hesitated in his speech at a dinner givan by the Fishmongers' Company.—*L.T.* 1932, p. 511.

Letting the Cat out—The discussion of the question of Cabinet secrecy recalls a story of Lord Robertson, the eminent Scottish Judge, which demonstrates that there are more methods than one of letting a cat out of a bag in the political world. During the constitutional crisis resulting from the budget of 1909, no one who had attended the final meeting of the Conservative party at Lansdowne House would say what had occurred. Lord Robertson *said* nothing compromising, but to a reporter of his acquaintance, he handed a sheet of foolscap with the remark, "I was just playing with a quill pen and I thought of you." The paper contained a list of names in the margin and a few sentences against each It was a complete minute of the decisive meeting.—*S.J.* 1932, p. 918.

Bar Council Report.—The council, having defined a "practising" barrister as "a member of the Bar who is entitled to practise and who holds himself out as ready to do so," held that "a practising barrister ought not to write for publication about cases in which he is or has been engaged." After he has ceased to

practise a barrister's literary activities are a matter for his own discretion, but he should, of course, bear in mind the confidences which have been reposed in him and the feelings of the Persons concerned in any cases he writes about.—*L.T.* 1933, p. 1.

Some other Bar Council Decisions.—Among other decisions of the Bar Council the following may be noted. On the not unimportant question of fees, the Council have held that a barrister ought not, "save in very exceptional circumstances," to allow reduction or elimination of an agreed fee after a case has been heard, and that the fact that a fee has been reduced on taxation is not such an exceptional circumstance. It having been reported to the Council that a County Court registrar had claimed a discretion under Order LIII, rule 22 of the County Court Rules to disallow counsel's fees where he did not consider the employment of counsel necessary, the counsel stated that they considered this decision wrong and hoped that an early opportunity would be taken in a suitable case to challenge the same. The words of the rule in question are exceedingly wide, but rule 1 of the same Order provides that all costs shall be taxed by the registrar "according to the scales." The scales deal with counsel's fees and with regard to them no specific discretion seems to be vested in the registrar "under the scales or rules." Among the other replies given by the Council, were rulings that a lady barrister who had practised under her maiden name might continue to do so after marriage, that an Officer in the Regular Army ought not to practise at the Bar concurrently with carrying out his military duties, though he might read in chambers, and that where a barrister held general retainers for two companies who afterwards became opposing parties in an action, the rights of the parties to his services depended on the dates of the general retainers and not on those of special retainers subsequently given. The question of retainers, it was stated, was under consideration by a special committee of the council.—*L.T.* 1933, p. 1.

Hilary Term.—That pregnant saying of the late Bishop Stubbs that "the roots of the present lie deep in the past" finds its exemplification all through our national history and very markedly in the law and legal organisation, although, immersed as most of us are in the daily round and common task of professional work, we rarely give heed to those aspects of our legal administration which call up old memories. Next week, what was formerly called Hilary Term, but which we now know as Hilary Sittings, commence. Why Hilary? Mention of that name recalls one of the Fathers of the Church, the great Bishop of Poitiers, often styled "Malleus Arianorum," on

account of the part he played in the Arian controversy of the fourth century, whose life work has been sketched with sympathy and admiration by the late Dean Farrar in his "Lives of the Fathers". But it may well be asked, how comes it that Hilary should have his name associated with one of the divisions of the English legal year? Here it is that Stubbs' saying receives fresh testimony to its truth. In those now far-off days when clerical influence in the domain of legal organisation was supreme, the clerics, who were the judges as well as the statesmen of the nation, decided that certain holy seasons should be exempted "from being profaned by the tumult of forensic litigations", and on what days the Courts might lawfully sit without wounding any ecclesiastical susceptibilities; and then it was that the practice arose by which each of the four divisions of the legal year was named from some festival or saint's day which preceded, or was coincident with, its commencement, and as Hilary's day falls on 13th January, the term commencing after the Christmas vacation was named in his honour. At one time, as the reader curious in such matters will find explained in "Blackstone," the terms played a great part in procedure, certain returns having to be made on particular days, and the Courts dealing with particular kinds of business on set days, but all this learning was swept away by the Judicature Act, 1873, which left the old names merely as serving to indicate the space of time comprised between the periods of vacation during which the Courts sit. A French writer in dealing with this subject made a careful calculation and found that after deducting Sundays and holidays our Courts sit about two hundred days in the year —a length of session which he seemed to regard as by no means excessive.—*S. J.* 1933, p. 1.

The Remuneration of the Junior Bar.—The Attorney-General (Sir Thomas Inskip, K. C.), in the course of his address at the Annual General Meeting of the Bar, held on Wednesday of last week, said, in effect, that most members would welcome the Council's recent decision on the thorny problem of the two-thirds rule. It had, Sir Thomas observed, never been in the interests of the Bar that rules should exist which prevented the services of its members from being given on terms which the lay client considered fair and reasonable, and he hoped that the modification just made in an at one time strict rule would help the public to understand that they were in no way penalised by the few rules laid down by the Profession for its own proper guidance. The rule in question, it may be noted, tended, and still tends, to keep down the fees of leaders as well as to raise those of members of the junior Bar, and its main purpose has been, not to victimise the public, but to aid the fair dis-

tribution of remuneration in accordance with the work done. Its recent modification is an additional reason for making the fees for the preliminary work of litigation a fairer recompense for the skilled, and, so far as the lay client is concerned, unnoted, labour devoted to anxious and responsible tasks by members of the junior Bar. Making telling speeches in court is not the principal means whereby junior counsel "travail for their livings", and, as the Attorney-General noted, the effect of their valuable preliminary and interlocutory services are often credited to their leaders. The two-thirds rule has had some slight effect in preventing the fee-books of counsel from bearing witness to this unfair attribution.—*L. T.* 1933, p. 61.

Counsels' Fees generally.—After noting that the modification of the two-thirds rule, referred to above, was not the only contribution of the Bar to keeping down the cost of litigation—the junior Bar having refrained from pressing their overwhelming case regarding remuneration for preliminary services—Sir Herbert Cunliffe, the new Chairman of the General Council, spoke of counsel's fees generally. The public, Sir Herbert thought, did not quite understand that the great mass of the work of the Bar was done for a moderate, and, in some cases, a quite inadequate reward. He referred to the popular delusion regarding counsel's remuneration, based on the heavy fees sometimes paid to fashionable counsel, and remarked that heavy fees were rare and that in some cases they were justified by the complexity and importance of the work done, though in others they were paid merely because the lay clients insisted on fashionable counsel being briefed. It was not fair to blame the counsel concerned, for often they had to put their fees up in order to keep their work manageable. Barristers generally would prefer to see a more equal distribution of financial rewards. The Bar, it cannot be too often reiterated, being an engrossing, dignified and attractive profession, has always attracted, and, even in these times, continues to attract, very many of the cleverest men in the country. Counsel with legal ability abound, and there are, as Sir Herbert Cunliffe said, plenty of able and experienced barristers willing to do sound and efficient work for reasonable remuneration. The sooner the public choose their counsel as sensibly as they select members of the other professions that serve them the better it will be for the Bar as a whole, whilst some few barristers may, justly or unjustly, consider that solicitors are not entirely blameless with regard to the unreasonable distribution of work. Certainly there is no other vocation in which conditions at all comparable prevail,

and this is, of course, due to some extent to the number of barristers who are congregated within a very small area. Some of the measures of decentralisation which have been suggested might do something to mend matters.—*L. T.* 1933, p. 61.

Judicial qualities.—In the speech biography of Viscount Buckmaster recently published under the title, "An Orator of Justice," there are several references by the noble lord to the qualities which should distinguish him who holds judicial office. In a finely-worded passage he pays tribute to that detached view which the great majority of those holding judicial posts take of the functions entrusted to them. As he says, "we may each of us repeat with pride the boast that 'there is no individual whose smile or frown, there is no Government, Liberal, Conservative, or Labour whose favour or disfavour can start the pulse of one of our Judges on the Bench, or stir by even one hair's breadth, the even equipoise of the scales of justice.' That has been obtained after centuries of effort and struggle, because any one who reads our history knows it was not always so." Elsewhere in the volume we have an attack on the system, formerly not unknown, to make promotion to the Bench dependent to some extent on political activity for the party from which promotion was looked for. "Judicial offices," said Lord (then Mr.) Buckmaster, "from the highest to the lowest have been tossed to this man and that man as a reward for party services, or, still worse, for personal favour. It ought to be regarded as an improper thing for a Government to appoint a man who is notoriously unfit, I do not say by reason of his character, but by reason of his disposition or temper or lack of learning and experience, to discharge the duties he is called upon to discharge." Observations such as these prompt the enquiry: What are the qualifications essential for the efficient performance of the duties which fall to the members of the Bench? A former Lord Chancellor was alleged to have said that in his choice of a new Judge he was primarily moved to select a gentleman and if he knew some law so much the better. Character was thus put first, and perhaps rightly so, but surely rather more professional knowledge than "some law" is desirable. Bacon, it will be remembered, insisted that Judges ought to be more learned than witty, more reverend than plausible, and more advised than confident. Further, that patience and gravity of hearing is an essential part of justice, an overspeaking Judge being no well-tuned cymbal.—*L. T.* 1933, p. 69.

BOOK REVIEWS.

THE NEGOTIABLE INSTRUMENTS ACT, by K.Bhashyam, B.A.,B.L. and K. Y. Adiga, B.A., B.L., Advocates, High Court, Madras. 5th Edition. Published by The Eastern Law House, Calcutta. Price Rs. 12.

It is with pleasure that we welcome the fifth edition of this well-known work. It is no exaggeration to say that ever since the appearance of its first edition, it has been recognised as the leading text-book on the subject of Negotiable Instruments and that every succeeding edition has added to its usefulness and lawyers and judges have, for nearly a quarter of a century, turned to its pages for light and guidance. This is not a little due to the fact that the authors have not always contented themselves with giving the effect of the decisions but suggested solutions of unsettled questions and expressed their own opinions wherever they are called for. To refer to only one instance in the present edition, the learned authors have doubted the correctness of the recent decision of Krishnan Pandalai, J., in 36 L. W. 29 (N. R. C.) and seem to prefer the older decision in *Muthu* v. *Velu*[1] on the question of the negotiability of a discharged note or bill and have given their reasons for the opinion at page 274 of the book. But at the time when they wrote the book the full report of the latest case might have not been available to them. The case has since been fully reported in *Venkanna* v. *Subbayya*[2] where the learned Judge has reviewed and discussed all the previous cases and authorities. It is perhaps an interesting speculation whether the discussion of the question in the case has led the authors to change their opinion. We wish to draw special attention to the portion of the work relating to the banker's rights and liabilities in respect of negotiable instruments on which recently there have been several pronouncements by the highest courts in England. The learned authors have collected them and given their effect and tried to evolve working principles out of them. We have no doubt that the work will meet the highest expectations of the bench and the bar.

THE LAW OF MADRAS LOCAL BOARDS, by C. V. Naidu, Advocate, Madras High Court. Part II. Price Rs. 5.

This volume is taken with the commentaries on the Indian Elections Offences and Inquiries Act and the Election Rules framed under the Madras Local Boards Act etc. The law is brought down by the author to the 15th November, 1932. As "elections have

1. (1916) 2 M. W. N. 107.
2. (1932) 64 M. L. J. 241.

come to stay in our country and they have their virtues and vices" and the defeated candidates are not always disinclined to attack the election of the successful candidates, even if they cannot thereby secure the seats themselves, this book is an indispensable guide to the candidates, their agents and advisers and also to judges who have to adjudicate on such questions. We have no doubt that this work will be largely used by all those having to do with elections and election offences in the Local Boards.

THE CODE OF CIVIL PROCEDURE, by Messrs. V. V. Chitaley and K. N. Annaji Rao. Vols. I and II. (Vol. III in the Press.) 1933 Edition. Published by The All India Reporter, Ltd., Nagpur. Pre-publication price Rs. 24. Post Publication price Rs. 28.

Much as one may regret it, there is no denying the fact emphasised in the Preface that the judicial decisions on the Law of Procedure occupy a considerable portion of our law reports and digests. The fact that the authors have taken two volumes of over 1,000 pages each to reach O. 31, Civil Procedure Code, shows the volume of case-law on this subject. The first volume deals with the sections and the second with Orders 1 to 30. The authors have taken great pains to compile all the cases under each section under appropriate headings for the benefit of the legal profession. The system followed, namely, to write a running commentary stating the general principles and relegating the list of cases to footnotes, with a small note in brackets about the point decided in each case, is convenient and calculated to give to the reader the clear law on a point in a short space. We congratulate the authors on the successful way in which they have given a clear summary of the principles deducible from the case-law. In cases of conflict of opinion the authors claim to have discussed the questions on first principles and arrived at definite conclusions. The claim is justifiable but we wish the discussion on principles is more frequent. Amendments in the rules by the various High Courts are set out under each rule and that enables one to better understand the law of the province. The book is only moderately priced at Rs. 24 pre-publication and Rs. 28 post publication. This book is a useful addition to the books on the subject. We have great pleasure in recommending this book to the profession as at the same time giving the law on the point and serving as a ready referencer.

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THE TIRUPATI TEMPLE AND CYPRES APPLICATION.

Much has been said and written about the application of the so-called *Cypres* doctrine both at the time when the Madras Hindu Religious Endowments Bill was discussed in Council and more recently when the Tirumalai-Tirupati Devasthanams Bill was discussed in the local Council. The Advocate-General, quoting some statement in an article in the MADRAS LAW JOURNAL, which itself was an extract from an article published in the *Hindu* when he was not a Law Officer of the Crown, had objection to the phraseology of a particular clause in the Tirumalai-Tirupati Devasthanams Bill. This objectionable expression, according to the Advocate-General, is to be found in cl. 37. There was no objection to any of the wordings in cl. 36. In this latter clause some contrast is made between "*administration* and *management*" with "the *maintenance*" or "with the *construction* and *maintenance*" of institutions or roads. We take it that the funds of a Devasthanam are *primarily* to be utilised for its *maintenance* and the *poojas* etc. and other *worship* to be conducted therein. This will be admitted to be the first charge. While cl. 36 refers to *maintenance* of educational institutions or *foundation* and *maintenance* of hospitals, choultries, etc., or the *construction* and *maintenance* of roads, when referring to the Devasthanams, it speaks only of their "*administration* and *management*". If sub-cl. (1) of cl. 36 had stated "the *maintenance, administration* and *management* of the Devasthanams" instead of merely "*administration* and *management*," it could have been said that the expenses for the due performance of the worship

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and other ceremonies and festivals according to usage and the Agamas would be covered by the expression "*maintenance*". Cl. 37 only speaks of the "surplus" and, therefore, the legislature should have made it clear that it is only the balance that may be left after amply providing for the pooja etc., worship, the performance of festivals and the proper maintenance of the Devasthanams that comes within the scope of the clause. No doubt the intention of the legislature is that it is only after ample provision made for the expenses connected with the Devasthanams any surplus is intended to be touched.

A writer in one of the local Dailies (*The Hindu*) states that these Devasthanams were subject to a scheme framed by the High Court and by the Privy Council and that the legislature should not do anything inconsistent with the provisions of the scheme. It is evidently forgotten that when the High Court was moved to give its sanction to the educational institutions founded by the Mahant for many years prior thereto, the High Court declared that the Mahant had no power to open such institutions and to expend moneys for the purposes of those institutions. But for the intervention of the legislature in 1914, some of the schools mentioned in the schedule to the present Bill would have been closed long ago. In that year a Bill was introduced into the local legislature to recognise these institutions and no objection was taken to the spending of the Devasthanam funds for these schools at the time. Since then two other schools were opened at Tirupati and the present Bill recognises them and says that the expenses connected therewith are a proper legitimate charge on the Devasthanam funds. The purposes referred to in sub-clauses (*ii*) to (*vi*) of cl. 36 are all purposes connected with the temple intended to give facilities to worshippers and to promote the worship and the clause enacts that the funds of the Devasthanam may be utilised for those purposes. It would have been better and indeed no orthodox minded person could have felt that the legislature was going out of the way if the draftsmen could have expressed the intention of the legislature more clearly. If cl. 36 of the Bill had been worded thus:—"The funds of the Devasthanam, after making due and proper provision for the daily and other worship and the performance of the ceremonies and festivals etc. according to usage and Agama Shastras and for proper maintenance, administration and management of the Devasthanams and their properties,

may be utilised as follows, *viz.*, "the maintenance, administration and management of the educational institutions referred to in Sch. II" etc., there could have been no legitimate objection raised. But, as it is, the Advocate-General or anybody else in the local Council had no objection to the wording and phraseology of this clause. If the High Court or the Privy Council scheme was not to be touched, these institutions in Sch. II would go. Again, the Madras Full Bench decided that the clause giving the High Court liberty to apply for modification of the scheme or to the District Court for varying the rules was *ultra vires*. There is no point in saying that the scheme is sacrosanct and should not be touched. As recognition of the schools was by statute it is only just that another statute should deal with them.

The Advocate-General, as stated already, had objection to the double negative employed in cl. 37 as going against the doctrine of *cypres* and he referred in support of his objection to an article that he wrote in the MADRAS LAW JOURNAL (51 M.L.J.) and stated that the clause would contravene the doctrine of *cypres* as understood in the English Courts of Equity and applied by those Courts to charitable trusts. In that article he also stated that the English Courts made a distinction between *religious* and *non-religious* trusts and that a *religious* purpose is not akin to a *non-religious* purpose and that funds devoted to religious and charitable purposes could not be applied *cypres* to non-religious, such as educational purposes.

Whatever may be the point in the objection to the enactment of S. 67 of the Madras Hindu Religious Endowments Act, we think it is not relevant to the specific clause dealing with the funds of the Tirumalai-Tirupati Devasthanams. The learned Advocate-General knows well enough that the doctrine of *cypres* has application only to funds dealt with or properties endowed by *wills* for charitable purposes. *Santana Ray* v. *The Advocate-General of Bengal*[1]. It has no application whatever to the case of the Tirumalai-Tirupati Devasthanams whose properties consist largely of the votive offerings of the worshippers, of the accumulation of funds from such votive offerings, of purchases from such votive offerings and of grants made by former Rulers, Zamindars, etc. At the time of

1. (1920) I. L. R. 48 C. 124 at 135: 32 C. L. J. 453.

Madras Act III of 1914, the accumulations from votive offerings came to 60 lakhs. Since then these had considerably increased and large landed properties have been purchased.

No doctrine of *cypres* is invoked by the legislature in enacting cl. 37. No distinction is made in the Hindu Law between *religious* and *secular* charitable trusts. *See* West and Buhler, Hindu Law, pp. 306 and 307 (*n*), 3rd edition; *I. Indian Law Quarterly*, p. 118 and *Muthukrishna Naicken* v. *Ramachandra Naicken*[1]. *See also* Ganapati Aiyar's Hindu and Mahomedan Endowments, pp. 23, 53, 54 and 206, so that the analogy of the English Law has no application. If the legislature was right in enacting Madras Act III of 1914 and recognising the educational institutions started and conducted by the Mahant on his own initiative and we think the legislature was perfectly right in doing it, there could be no objection in enacting sub-cl. (*iii*) of cl. 37 as worded therein. We do not say that even if the words "not inconsistent" were omitted and the word "consistent" was employed there would be any difference. Apparently those who objected to the change of phraseology thought that they might be taking some risk with reference to the construction of S. 67 of the Madras Hindu Religious Endowments Act II of 1927. We think this section of Madras Act II of 1927 has no bearing whatever. In cl. 37 there is no question of any application of any doctrine of *cypres*, while S. 67 of the Madras Act II of 1927, which deals with all temples, may be said to enact some doctrine of *cypres* as it could not be predicated whether all endowments of temples coming under the scope of the Act are of the character dealt with by the legislature as regards Tirumalai-Tirupati Devasthanams. Courts have to deal with particular definite purposes stated before them and it is just as difficult or easy to determine whether those purposes are "consistent" with the purposes of the temples as it will be difficult or easy to say whether those purposes are "not inconsistent" with the purposes of the temples.

If the doctrine of *cypres* has no application, it may be said there is no legitimate scope for applying in the manner the legislature has done, though the Advocate-General did not object on that ground. Let us consider what the legislature

1. (1918) 37 M. L. J. 489 at 502, 503 and 506.

intends by the enactment of cls. 36 and 37. If, as a matter of fact, any property is endowed for any specific services of the idols in the Devasthanams, there may be something to be said in the objection that it is highly objectionable to divert the funds intended by the donor for one purpose to another purpose. But the legislature has not in cls. 36 and 37 touched any specific endowments. Cl. 36 speaks of "the funds of the Devasthanams" and cl. 37 deals with the surplus funds of the Devasthanams. Both clauses do not use the term "endowment" which is defined in the Act as meaning "all property belonging to, given or endowed for the support of the Devasthanams or for the performance of any service or charity connected therewith and includes the temples and any offerings made to the idols therein". Now in this definition two kinds of properties are dealt with: (1) what may be called general endowments, and (2) what may be called specific endowments. It is the former class that is dealt with in cls. 36 and 37.

With regard to the general funds, an illustration is given in the definition itself, *viz.*, offerings to idols. What is the intention with which these offerings are made. Certainly, no specific purpose is intended when the public make these offerings. They go to the general coffers of the Devasthanams and augment their income. So are the various funds of the Devasthanams which have been endowed by others and are intended for all the general purposes of the Devasthanams. In the case of properties purchased out of the accumulations of the votive offerings they are the properties of the Devasthanams intended for application for all general purposes.

Now the purposes of the temple are various. No doubt the *primary* purposes are the upkeep and maintenance of the Devasthanams, the expenses connected with the daily and other worship of the idols, the expenses connected with periodical festivals and processions etc. As *ancillary* to these purposes, certain other purposes follow, such as expenses in connection with persons who have to perform the worship etc., the establishment etc.

There are, however, other purposes of a temple which may not be *primary* but which are *quite proper* purposes of a Hindu temple. Now schools for the spread of religious learning, for improving the knowledge of the Agamas and Tevarams, Tamil prabandhams etc. and for recitation of Vedas etc. are proper

adjuncts of a temple and come within the scope of temple charities. Indeed the Advocate-General had no objection to the provisions of cl. 36 at all. No question of any *cypres* application properly arises in such cases. Schools for *secular* education have been sought to be distinguished by some persons who have had western education. It is sought to distinguish between *religious* from *secular* charities and it is stated that a *temple* being a *religious* charity there can be no justification for utilising *temple funds* for *secular* purposes. This, however, is quite a mistaken notion. The Hindu Law makes no distinction between religious and non-religious purposes. As stated by Messrs. West and Buhler " religious and charitable purposes are coupled together in the Hindu authorities ". (3rd Ed., pp. 206, 207 (*n*). See *I. Indian Law Quarterly*, p. 118.) Apart from this, according to the Agama Shastras, "a temple has attached to it a tank, a grove, a choultry, a school and a lecture-hall ". The Uttara Kamika Agama in Chapter 67 states that seats of learning should be established in temples and that the teaching in these should be in Sanskrit and Dravida languages. The Supra Bheda Agama in Chapter 36 stated that provision should be made for teaching and expounding all the Vedas, Chandas, Sastra, Jyotish Shastra, Siksha, Kalpa, Nirukta, Vyakarana, Saiva Siddhanta, Pasupata Siddhanta, Soma Siddhanta, Buddha faith, Arhata faith and Pancharatra. The question has been dealt with in *I. Indian Law Quarterly*, pp. 119 and 120.

The above purposes of a temple will show that a trustee is quite within his rights in spending for all or any of these purposes without any authority from Court if he has got funds enough for the same. There is no question of any application of the doctrine of *cypres* in such cases which can only be done under the authority of Court. That Hindu Rajas prior to the British advent regarded the temple purposes or purposes of choultries as *various* and applied the funds to establishing *dispensaries, schools of learning*, etc., will appear from the letter of the Rajah of Tanjore extracted by *Seshagiri Aiyar, J.*, in *Muthukrishna Naicken* v. *Ramachandra Naicken*[1]. In the *Dakore Temple case*, an *English* school and a *Sanskrit* school were directed to be established by a scheme framed by the Bombay High Court and provision was made for meeting the

1. (1918) 37 M. L. J. 489 at 501 and 502.

expenses of the same from the temple funds. When the scheme was first framed a *dispensary* and a *school* were provided for. See *Ganapat Rao* v. *Ramadhin Doss*[1]. When the case came before the High Court a second time, besides the dispensary, an English school and a Sanskrit school were directed to be established. [(1879) 4 Unre. P. J., Bom. H. C., p. 471 at p. 491.] The Judges who directed the establishment of these schools (*Westropp* and *West, JJ.*) and the Counsel who appeared in those cases (all of whom were eminent Hindu lawyers) never felt that there was any objection in utilising temple funds for these purposes. After the Hindu Sovereigns, when the British Government became connected with the management of these institutions they utilised the surplus funds for the construction of roads and bridges and for expenses of education. See the papers from the Parliamentary Blue Book on Idolatry dealt with in *I. Indian Law Quarterly*, pp. 125 to 132. No Hindu and there must have been more Sanatana orthodox Hindus in those days than now ever objected that such application was diverting temple funds or was improper. On the other hand, people still appeal to those days and to the management of Government as the best in the history of these religious institutions.

The question has been dealt with in *Muthukrishna Naicken* v. *Ramachandra Naicken*[2]. *Seshagiri Aiyar, J.*, in an elaborate judgment discussed the question and has come to the conclusion that such application is proper and legitimate. That was a case of devise and the testator directed his property to be given for distribution of *thaligai* in various temples in which he was himself performing similar charities during his lifetime. In the course of his judgment the learned Judge observed (pp. 505-506):

> "The donations made to a deity often take the strictly legal aspect of charity as understood by English lawyers. Grants for feeding the devotees, for giving them shelter, for giving them water are made in connection with religious institutions. Grants are frequently made to reward persons who chant the Vedas or the *prabhandam* when the *utsavams* are in progress. I cite these instances to show that in the eyes of a donor, the feeding of the poor and the encouragement of educated men are regarded as purposes gratifying to the deity. If that is so, how can a management be charged with misapplication, if it uses the surplus funds to enable young men to gain knowledge or to give them food while reading in schools and colleges."

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1. (1874) Unre. P. J., Bom. H. C., Vol. II, p. 277.
2. (1918) 37 M. L. J. 489.

It will thus be seen that when owing to change of conditions and circumstances or the progress of time the income of properties belonging to a temple increases and there are innumerably large votive offerings by devotees and surplus accumulates, it is legitimate for a trustee to apply the same among others to schools etc. where secular instruction is taught and that the legislature in enacting cls. 36 and 37 only intends to restrict the powers of trustees to spend as they please and to give certain general principles which should guide them just as Courts would do by framing a scheme.

It is then said that by promiscuously utilising temple funds in this way, the people who want to utilise the same will only be killing the goose that lays the golden eggs and that votive offerings of devotees will cease and no scope for application of any surplus. In the first place, people who are in this way of thinking forget that the faith of the devotees and their motives in making such offerings do not in the least depend on the way in which their gifts are applied. If the faith of the Hindu people has not been in any way shaken and the offerings have not ceased in spite of the notorious misappropriation and scandalous mismanagement of the previous Mahants, it is not going in the least to be shaken by the fact that they would see that their gifts would be utilised for various public benefits. Indeed the determination and making of the vows which result in the votive offerings to the Tirupati Deity do not depend on the application of the gifts and arise irrespective of such application.

In the second place, in the case of caste institutions where trustees are influential and charges of mismanagement and breaches of trust are brought forward against them and it is sought to remove such defaulting trustees, it is often a stock *argument* in favour of such trustees that if they are removed the income of the institutions will suffer. The answer of *Scott, J.*, is well worth perusal. In *Thackersey Dewraj* v. *Hurbhum Nursey*[1] :

"It has been stated more than once, in the course of the case, that, if these present trustees are removed from their post, the subscriptions and offerings to the temple will fall off. Of course I am bound to have regard to the question whether the appointment of new trustees will promote or impede the execution of the trust. But I am sceptical about the threatened result.

1. (1884) I. L. R. 8 Bom. 432 at 471.

Other men of the caste, of position and respect will be found, I do not doubt, to take the place, and the votaries will renew their offerings when the temple affairs resume their normal state. But, however that may be, I cannot allow an evil precedent to be established and the maladministration of a public trust to go without redress, because the wrong-doers are men of influence, leaders of the caste, able to persuade a number of private persons, members of the same caste, to throw a cloak over the abuse. The management of the temple can be conducted on the income of the accumulated fund alone if placed in safe hands. The worst consequence, if no offerings were made, would be the absence of a surplus. Surpluses, in the past, have not been much devoted to the charitable objects of the funds to which they are subscribed. It is evident from the amount of the accumulated fund, that very little has been dispensed in charity, and the increase of the temple store is not a very important object. The threatened consequence is not sufficient to deter the law from taking its course."

Applying the above to the present case, we are not merely very *sceptical* about the *threatened* result but hope that human nature is neither so calculated nor so degraded as to lead to induce faithful devotees to abstain from making vows or to be less generous in their contributions. Indeed, as observed already, the motives of people in making vows do not depend on the consideration what will happen to their gifts when made but on other considerations personal to themselves. These offerings far from having fallen have increased with the growth of time notwithstanding the embezzlement of vast sums of money by previous Mahants. We have no doubt that the new management will afford all possible conveniences and even luxuries to people who visit the Devasthanams and make their offerings and will be solicitous about their conveniences and welfare. We hope also the application of the surplus to a University of Oriental Learning and Research to be established will promote more people to contribute their mite to the funds of the Devasthanams so that they may also feel that they are contributing to the public benefit.

It was the right of the Sovereign in the exercise of superintending authority, prior to the giving up of the British connection, to direct the application of the surplus to purposes which are within the scope of temple charities. The Local Government have by this legislation left it to a particular body to exercise this right. We hope that this body will have true regard to the various purposes of the Tirupati Devasthanams and will direct the application in such a way as will promote those objects and as no Hindu devotee will regard with abhorrence. At any rate they will do nothing to shake the

faith of the Hindu devotees upon which of course depends the future income of these Devasthanams.

P. R. GANAPATHI IYER,
Advocate, Madras High Court.

SUMMARY OF ENGLISH CASES.

In re GEORGE INGLEFIELD, LIMITED, (1933) 1 Ch. 1.

Hire-purchase agreements—Company—Voluntary winding up —Agreements with a discount company to finance—Assignment to the discounter of goods subject to the hire-purchase agreements—Nqn-registration of under the Companies Act—Whether invalid.

G. I. Company carried on business in furniture and from time to time they made what are called Hire-Purchase Agreements with their customers, and for the purpose of obtaining money they entered into a contract with the discount company, whereby that company agreed to make certain payments to them. The question was whether the sums which became due under hire purchase agreements were charged to the discount Company by G. I. Ltd., and therefore required registration and in default of registration was void as against the liquidator. The effect of the agreement was that G. I. assigned to the discount company the goods which were the subject-matter of the hiring agreement, together with the rights which G. I. had as against the hirer. It also provided that after the discount company shall have received from the hirer or the dealer G. I. in respect of all the hire-purchase agreements comprised in the assignment, sums amounting in the aggregate to the purchase price paid by the discount company under the terms of the assignment, that company is to allow the dealer G. I. to retain all the subsequent instalments of rent, or other moneys, due from the hirer, etc.

Held, that the transaction was one of assignment to the discount company and not merely one of charge. Though the legislature has been careful to safeguard all persons having dealings with a limited company by providing for the registration of any charge over its assets, it has not introduced the doctrine of reputed ownership into the winding up of companies. There is nothing to prevent a limited company from selling its assets without giving notice of it to the public.

In re SIR THOMAS SPENCER WELLS. SWINBURNE HANHAM *v.* HOWARD, (1933) 1 Ch. 29.

Crown—Bona Vacantia—Mortgagee—Dissolution of Company before 1929—Mortgagee if trustee of equity of redemption—S. 296, Companies Act, 1929—If retrospective.

A company mortgaged its interest in three leasehold properties to *W* in 1899 and assigned to him, the whole of the unexpired residue of the terms for which they were held subject to the usual proviso for redemption. It covenanted also to repay the mortgage amount with interest at 4 % per annum. In 1910, the company went into voluntary liquidation and a liquidator was appointed. In 1916 the company was dissolved but as then there was a large sum due to the mortgagees and the net rents were insufficient to pay the full interest on them, the liquidator thought the equity of redemption was of no value, and he took no steps to either surrender it to the mortgagees or sell or dispose of it to any other person. After dissolution, the rents had largely increased in value and the arrears of interest was largely paid off therefrom. The equity of redemption had become of value. The crown claimed to be entitled to the equity of redemption as *bona vacantia*, while *W* claimed to be entitled to the property free from any equity of redemption as survivor of the mortgagees to whom the property had been assigned.

Held, that the right of the crown to *bona vacantia* can be applied to an equity of redemption of leaseholds, which is not vested in any specified person; for it is not to be considered as a mere equity. The right of the crown to succeed to the personal estate vested in a company at the time of its dissolution does not differ in substance from the right of the crown to succeed to the personal estate of a person dying intestate without next of Kin. In both cases the title of the crown arises because the property has no other owner; such property must not be confused with property the owner of which is unknown. The difference between the case of an intestate and of a dissolved company is purely one of form. S. 296 of the Companies Act, 1929 is not retrospective.

In re AIREDALE GARAGE COMPANY, LIMITED: ANGLO-SOUTH AMERICAN BANK, LIMITED *v.* THE COMPANY, (1933) 1 Ch. 64.

Company—Receiver on behalf of debenture holders—Payment of rates under S. 264—If rates due as then fixed or rates declared subsequently to be due by an increase in the rate—Additional rate also if payable before debentures—'Due and payable within 12 months next before'—Meaning of—Companies Act, 1929, Ss. 78, 264.

In exercise of a power contained in the debentures, a receiver G.W. was appointed of a company's assets and undertaking on 28—1—1931. For the period between April 1, 1930 and January 28, 1931, a premises belonging to the company was assessed at *72l* for rating purposes. On appeal by the Revenue officials the rateable figure was increased from *72l* to 212*l* on November 13, 1931. Under

S. 264 of the Companies Act, 1929 it is enacted that in a winding up there shall be paid in priority to all other debts (*inter alia*), all parochial or other local rates due from the company at the relevant date and having become due and payable within twelve months next before that date. The question arose if even the increased rate was entitled to priority, the contention being that it was determined that he was liable to pay that amount only on 25—9—1931, and that was not within the period of twelve months before the relevant date January 28, 1931.

Held, that though the determination of that liability was in respect of the rates which fell to be paid between April 1, 1930 and January 28, 1931 date of appointment of the receiver, yet the rate in question was part of the additional rate for that period. It was not finally measured until a date subsequent to the twelve months referred to in S. 264. In the case of a revision, the amendment is to have effect as from the commencement of the period in respect of which the rate was made. This rate therefore became operative from April 1, 1930 and was therefore entitled to priority over the debenture holders. The words 'due and payable' in S. 264 are meant to refer to a liability in respect of which there had to be a payment, and the particular debt for additional rates must be deemed to have become due and payable within the period of the twelve months next before the relevant date.

In re MONROS' SETTLEMENT. MONRO *v.* HILL, (1933) 1 Ch. 82.

Construction—Marriage settlement—Trust for payment of income to wife after her husband's death "during her life or until she shall marry again"—Dissolution of marriage by Court—Remarriage by wife while husband still alive—If wife takes under the clause.

By a marriage settlement property was assigned to trustees with a provision that from and after the husband's death the trustees shall pay the annual income of the property unto his wife if she shall survive the said husband during her life or until she shall marry again. The marriage was dissolved on the petition of the wife in 1916 and the wife remarried another in 1930. The husband of the settlement died in 1932. The question arose if the wife took under the clause in spite of her remarriage.

Held, that the trust arises only upon the death of the husband, and the words "until she shall marry again" are words of futurity, *prima facie* applying only to marriage after the husband's death. The remarriage which took place during his lifetime does not come within the defeasance clause and the wife is therefore entitled to the income until she marries again.

Fitzgerald v. *Chapman*, 1 Ch. D. 563 relied upon.

ATTORNEY-GENERAL *v.* CORKE, (1933) 1 Ch. 89.

Nuisance—Owner of a field—Allowing a caravan party—Nuisance by—Liability of land owner—Injunction.

An owner of a disused brickfield began to license persons who live in caravans to place their caravans on the field and to live in them there for rent. A number of caravan dwellers so occupied the field. They led a nomadic life and their habits was a menace to the neighbourhood. They threw slop water and deposited human excrement upon the neighbouring land and fouled in various other ways. They were making heavy noise, fighting, using bad language and so on. They permitted their horses to trespass on the adjoining lands and damage property. The Attorney-General at the relation of the Rural District Council having authority over the land applied for abatement of nuisance.

Held, the acts were such as to endanger the health of those who live in the neighbourhood. It is not unlawful for a person to grant licenses to caravan dwellers to place their caravans on his land. But in bringing on to his land, for his own profit, a number of people who dwell in caravans, the owner puts his land to an abnormal use. The principle of *Rylands* v. *Fletcher*, L. R. 3 H. L. 330 applies and the owner becomes liable for the nuisance of the occupiers and an injunction can be granted against him restraining him from allowing the occupants of the camps to do the specific acts complained against.

N.B.—The order has also been set out at the end of the judgment in the Report at p. 96.

In re DE CARTERET. FORSTER *v.* DE CARTERET, (1933) 1 Ch. 103.

Will—Charity—Trust for providing annual allowances for widows below a certain income—Preference to widows with young dependant children on them—Validity of.

A testator by his will bequeathed a sum of 7000*l* to *F* and *S* upon trust " to invest the same . . . . and to use the income thereof in providing annual allowances of 40*l* each to widows or spinsters in England whose income otherwise shall not be less than 80*l* or more than 120*l* per annum . . . . . Preference shall be given to widows with young children dependant on them. . . . . . ."

Held, that this was a case of a gift to trustees for the purpose of relieving persons of limited means—here persons whose means are between 80*l* and 120*l* per annum—whose circumstances are such that it is very reasonable that some contribution from the bounty of the testator should be made to them to enable them to

carry out their duties as citizens. Such an object is a good charitable object and the gift is therefore good.

In re CHAPLIN NEAME *v.* ATTORNEY-GENERAL, (1933) 1 Ch. 115.

Will—Charity—Home of Rest—If a charitable bequest.

By his will, *C* (the testator) declared that his trustees should stand possessed of a freehold house and residue of his estate "on trust for the purposes of and to establish and found a charity and by means of the same run a charity having the following objects, namely: to provide a Home of Rest that shall afford a means of physical and mental recuperation to persons in need of rest by reason of the stress and strain caused or partly caused by the conditions in which they ordinarily live and for work. It further added that "the trustees shall . . . . . apply to the Chancery Division of the High Court of Justice or to the charity commissioners for a scheme in respect of the said charity . . . . In considering the suitability of a candidate for admission to the home, his or her need and the economic situation of the charity shall, but the financial position of the candidate shall not, be taken into account.

Any person admitted to the home may be required to pay for his or her board and lodging and other benefits received by him or her according to his or her means . . . . . Fees for medical attendance and for treatment to be paid for by the patient where reasonably possible but if thought by the trustees to be necessary or desirable the trust funds may be drawn upon for such fees to a reasonable extent."

Held following *In re* James, (1932) 2 Ch. 25 that this was a good charitable trust. If anything this is stronger than *In re* James.

In re COSSENTINE. PHILP *v.* TRUSTEES OF THE WESLEYAN METHODIST. LOCAL PREACHERS' MUTUAL AID ASSOCIATION, (1933) 1 Ch. 119.

Construction—Will—Bequest "to be divided between A *and the heirs of my brothers and sisters"—Two sisters and heirs of brother alive at dates of will and Testator's death.*

By his will *H*, the testator after bequeathing various pecuniary legacies proceeded as follows:—"The rest of my property of whatsoever kind I give to my wife and after her decease to be divided ***between the Local Preachers' Mutual Aid Society and the heirs of my brother and sisters.***" At the date of the will the testator had two sisters living each of whom had one child also living on that date. He had one brother who was dead at the date

of the will but had left a wife and one child living at the date of the will.

Held following *In re* Dale, (1931) 1 Ch. 357 that the gift "to the heirs of my brother and sisters" was in effect, identical with a gift "to the heirs of my deceased brother and sisters" and must be construed as a gift "to my sisters and the heirs of my brother" and not as being a gift "to the heirs of my brother and the heirs of my sisters." The gift "to the society and the heirs of my brother and sisters" is a gift to be divided between the charity, the sisters, who were alive at the testator's death, and the daughter of his deceased brother in equal fourth parts.

In re HARPER, (1914) 1 Ch. 70 relied on.

COUSINS *v*. SUN LIFE ASSURANCE SOCIETY, (1933) 1 Ch. 126.

Insurance—Policy effected by husband on his life—Policy declared as for the benefit of wife—Death of wife during husband's lifetime—Destination of the Policy.

A husband effected with the defendant company two policies of insurance on his own life for 15000*l* and 3000*l*. Each policy contained a declaration that the policy was issued for the benefit of L. C. the wife of the assured; under the provisions of the Married Women's Property Act, 1882. From the covenant to pay, the words "to the person to whom this assurance is granted or his executors, administrators or assigns" are struck out in each policy and no other payee is named. L. C. died leaving a will and the question arose as to who was entitled to the policy amount, the husband or the wife's personal representatives.

Held by Eve, J. that the effecting of the policies created a trust in favour of L. C. in the event of her surviving the assured. Her interest was only a contingent one and on her death in his lifetime the trust failed for want of any continuing objects and the moneys payable thereunder became the property of the assured.

Held (on appeal reversing Eve. J. that she took a vested interest in the policy moneys when the policy was created. On the plain terms of the policy there remains the trust to pay over the moneys due under the policy to the executors of L. C., with the result that the trust in her favour was not ended by her death and the interest passed on her death to her executors as part of her estate.

TOWNSHEND *v*. CHILD, (1933) 1 K. B. 181.

Husband and wife—Action by widow against third party for damages—Remarriage of widow pending action—Action going against widow—Order for costs—Amendment of cause title.

The plaintiff, a widow of *T*, brought an action against the defendant for damages for alleged negligence as a professional man. Before the evidence for the defendant was concluded, the jury stopped the case, as they felt the defendant had not been guilty of negligence. The Judge agreed with their view. At the time of the institution of the suit in 1930, the plaintiff was a widow. In 1932 before the decree she remarried one *B*. The Judge therefore directed amendment of the cause title to *T*, widow (married since action brought, namely, on March 23, 1932 to *B*)." The question arose as to the proper form of the order as to recovery of costs in view of the fact that subsequently she remarried.

Held, that the judgment against the plaintiff should be in the form of *Scott* v. *Morley*, 20 Q.B.D. 132, as recognised and applied by the Court of Appeal in *Birmingham Excelsior Money Society* v. *Lane*, (1904) 1 K. B. 35 and that the costs against the plaintiff shall be recoverable against her separate estate, whether subject to restraint on anticipation or not.

HALL *v.* BROOKLANDS AUTO RACING CLUB, (1933) 1 K. B. 205.

Negligence—Race course—Motor race—Spectator on payment—Accident to—Liability of owners of the race course.

The racing course at Brooklands is a kind of oval over two miles round, including at one part a long straight stretch over 100 feet wide. On the right hand side, where many spectators stand, the course was bounded by a concrete Kerb 6 inches in height; on the far side of the Kerb was 4′ 5″ of grass, and then an iron railing 4′ 6″ high. The spectators are absolutely safe in the greater part of this ground, but as most of them like to get as near the racing as they can, they place themselves along the railing. There was a long distance competition. The plaintiff was a spectator having paid for witnessing the race. A car when in full speed at over 100 miles an hour swerved to the right and the hub of its off hind wheel touched the hub of the near front wheel of another car with the most startling result, namely that the blow threw the car through the air and fell and injured some spectators near the railings. The race course was in use since 1907 and this was the first time any spectator had been injured by a car leaving the track. In an action by the plaintiff, a spectator, for damages against the race course owners for injuries to him due to the accident, the jury held that the race course owners were guilty of negligence, in that being the owners of premises used for the carrying on of a highly dangerous sport at which accidents had happened and were likely to happen, they failed by notices or

otherwise (i) to give warning of or protection from the dangers arising from the sport (ii) to increase the height of the barriers and (iii) to keep the spectators at a safe distance.

Held on appeal that there is no absolute warranty by the company that the premises are safe, but only that reasonable skill and care have been used to make them safe. The person paying for the ticket to witness the race takes upon himself the risk of unlikely and improbable accidents, provided that there has not been on the part of the occupier a failure to take usual precautions. No person can be under a legal obligation to guard against that which he has no legal duty to anticipate, unless he is an insurer of the safety of his invitees. The company cannot therefore be held liable for this extraordinary event which they could not anticipate.

OSBOURNE *v.* RICHARDS, (1933) 1 K. B. 283.

Road Traffic—Proprietor of motor coaches—Letting of coaches—If hirer used them as 'stage carriages' or 'contract carriages'—Road license if necessary—Road Traffic Act, 1930, Ss. 61 and 72.

R, a motor coach proprietor let out his coaches for hire to *T* foot-ball club who were to collect the fares from the passengers. It was found that though so hired it was driven by employees of *R* and fares also collected by them. Any one who came along could have boarded the coaches in the square and ridden therein to the foot-ball field and there was no notice on the coaches to show that they had been hired by the foot-ball club. A fixed hire was paid by the club to *R*. As no road service license was taken out by *R*, or *T*, a complaint was preferred against *R* in that he permitted a public service vehicle to be used without license. *R* contended that they were used as "contract carriages" within the meaning of Section 61, sub-S. 1 (*c*).

Held, that the said vehicles were used as 'stage carriages' and not as 'contract carriages' and therefore a road license ought to have been taken out. The vehicle was not carrying passengers stage by stage but for hire or reward at separate fares.

MALONEY *v.* ST. HELENS INDUSTRIAL CO-OPERATIVE SOCIETY, LIMITED, (1933) 1 K. B. 293.

Master and servant—Arbitration—Wages 'during periods of sickness'—Disablement by accident—If 'sickness' within the meaning of the clause.

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M was a grocer's assistant in the employment of *H* Co-operative Society. His wages were *3l*, weekly. It was a term of the employment that during periods of sickness where absence from duty is properly vouched for by medical evidence, a particular rate of wage, different from that on duty, shall be paid. In the course of his employment with *H*, the assistant *M* crushed his thumb and was thereby incapacitated for work for 6 weeks, and the absence from duty was properly vouched for by medical evidence. The question arose if the employee was entitled to compensation under the agreement as during period of sickness. or as the Employer's contended under the Workmen's Compensation Act.

Held, that 'period of sickness' in the agreement included also period of disablement due to accident. The parties to the agreement were thinking about the case of a workman who for some reason was prevented from being on duty and deciding what he should receive as wages during that period. 'Sickness' includes incapacity due both to disease or bodily or mental disablement.

DONKIN *v.* DONKIN, (1933) P. 17.

Husband and wife—Summary Jurisdiction Act, (1848), S. 11 —Complaint of 'persistent cruelty'—Only one act within 6 months of complaint—If acts of cruelty prior thereto admissible.

In July 1932 a husband assaulted his wife cruelly and she thereupon laid a complaint under S. 11 of the Summary Jurisdiction Act for 'persistent cruelty.' That was the only assault within 6 months, though prior thereto there were several cruel assaults. Under S. 11 'such complaint shall be made..within six calendar months from the time when the matter of such complaint..arose.' It was contended that there was only one assault within six months, and there being no other assault shown within six months, it cannot be said that there was persistent cruelty within six months.

Held, that the real question is not if within the 6 months he has been persistently cruel but whether the cruelty which is shown to have taken place within 6 months is part of a course of conduct —part of a course of cruelty—which was persistent. If a man keeps his wife in fear and subjection by threats, he is guilty of cruelty.

JOTTINGS AND CUTTINGS.

Lord Wright Comes Down to Help Us.—The surprise item was Lord Wright, sitting in Court IX, engaged, as of yore, in the hearing of Commercial cases. Rarely indeed, if ever before, has a

Lord of Appeal in Ordinary come down from the Lords and the Judicial Committee to do the everyday work of a puisne in a Court of First Instance. One might have thought that if such an exalted person desired to help with the arrears he would say to Scrutton or Greer or Slesser (L. JJ.) : Here, you give me your list and you go off and help the L.C.J. in the Courts below. Yet such is not the mode. With the least disturbance possible Lord Wright laid aside his higher dignity and came down to Court IX to help us in the King's Bench Division, and at the time of writing he is proceeding quietly, unostentatiously and efficiently with the work. It is regarded as unlikely that he will be called upon later in the Lords to hear an appeal from himself.

Lords have, it is true, helped in the Courts of First Instance in the past. Lord Birkenhead, when Lord Chancellore did so. Lord Darling's service in Court IV is of recent date. But at the moment I cannot recall the case of a Lord of Appeal in Ordinary giving such lowly, yet noble, proof of his consciousness of the arrears.—*L. J., 1933, p. 46.*

Fifty Years Ago.—A great judicial figure when the legal centre was moved from Westminster to the Strand was the first Lord Coleridge, who had been made Solicitor-General by Mr. Gladstone in 1868, and Attorney-General, in succession to Sir Robert Collier, in 1871. Law officers at that time were not precluded from private practice, and Sir John Coleridge, as he then was, had is full share of the best that was going. He shone brightly in two long-drawn-out cases: *Saurin* v. *Starr* and the *Tichborne case.* The action for ejectment was tried in the Common Pleas before Bovill, C.J. Coleridge was leader for the defendants, and with him were Hawkins, Honyman, Barber and Bowen. The two first and the last became, in the fulness of time, Lord Brampton, Honyman, J., and Lord Bowen. His opening speech occupied 23 days; and for three long weeks did Sir John cross-examine the claimant. " Though the cross-examination was considered lacking in startling or exciting episodes, no reasonable man at the end of it believed that the claimant was Roger Tichborne." The case had begun in 1871 and was stopped by the jury in the summer of 1873.

Killed, it is said, by the worries of the Tichborne trial, Bovill. C.J., died in the November following, and Sir John Coleridge succeeded him as Chief Justice of the Common Pleas. In January, 1874, he was created Baron. It was in 1880 that he became Chief Justice of the Queen's Bench with title of Lord Chief Justice of England. He died in 1894.—*L.J. 1933, p. 46.*

The Citation of Scottish Cases.—Lord Macmillan contributes a useful note to the current *Law Quarterly Review* on the above subject. He points out that many English lawyers, in their ignorance of the Scottish formula for describing married women, by which Miss Ann Smith, when married to John Jones, becomes, for the purpose of all legal documents, Mrs. Ann Smith or Jones, are mystified by the double appellation which they seem to regard as a sort of alias, with the unfortunate result that the first or maiden name only is not unseldom quoted in English reports, as has already happened in the case of *McAlister (or Donoghue)* v. *Stevenson*. Although this journal must plead guilty to *"Mc Alister's case"*, albeit in good company, which, it appears, does not exclude members of the Court of Appeal, the proper designation of the parties is, as the writer emphasises, *Donoghue* v. *Stevenson*, the maiden name being relegated to an appropriate oblivion. As Sir Frederick Pollock suggests in an article elsewhere in the *Review*, with the picturesque title "The Snail in the Bottle and Thereafter," the case would probably have achieved immortality in those old days when tables of cases were yet in their infancy as "The Snail's Case," as even *Langridge* v. *Levy* is to many merely "The Gun Case," but nowadays a description is demanded at once more precise and less colourful. That being so, it is to be hoped that the reporters on this side of the Border will, in the interests of uniformity of citation, consent to accept the counsel of Lord Macmillan, and refer in future to such appellants, or, it may be, respondents, by their married names only. In the same note his Lordship refers to another and surely less excusable mistake. Need it be pointed out that the Scottish official reports are Session—(not Sessions)—Cases?—*1933, L.T., p. 40.*

Masters in the Chancery Division.—The office of Master of the Supreme Court on the Chancery side, to which Mr. William Francis Spencer Hawkins has just been appointed to fill the vacancy created by the retirement of Mr. Watkin Williams, is one of the comparatively few posts in the Courts for which members of the solicitor branch of the profession are alone eligible. The present race of Masters are not the lineal descendants of the old Masters in Chancery, who went back, if not to a time during which the memory of man runneth not to the contrary, at least to a very early period in our legal history. In Bacon's time, as we are remained in Mr. John Ritchie's scholarly introduction to the Reports of Cases decided by Bacon during the years 1617-1621, there were then eleven Masters, two of whom usually sat in Court with the Chancellor or other judge in readiness to give assistance if called upon.

After a certain period of service they were usually rewarded with knighthood, and in some instances the Mastership was a stepping stone to the Bench. Many notable lawyers served the office, including one in later days, namely, Sir William Horne, who had been Attorney-General, and who apparently was content to subside into this not unimportant yet subordinate position. The old Masters in Chancery were abolished by 15 & 16 Vict. c. 80, which, after reciting that "whereas proceedings before the Masters in Ordinary of the High Court of Chancery are attended with great delay and expense, and it is expedient that the business now disposed of in the office of such Masters should be transacted by and under the more immediate direction and control of the judges of the said Court," proceeded to abolish the office of Master, to empower the judges to sit in chambers for the despatch of business, and to enable them, with the approbation of the Lord Chancellor, to appoint two Chief Clerks to be attached to each judge for the purpose of assisting in the work of the Court. Under the Act the qualification for the office was that each appointee should have been admitted a solicitor and should have practised as such for at least ten years immediately preceding his appointment. The duties attaching to the office are highly onerous, much more so than might be assumed to be the case from the fact that for so many years it carried merely the comparatively humble title of Chief Clerk, and this would appear to have struck those in authority, for in 1897 the status of the Chief Clerks was enhanced by their being transformed into Masters of the Supreme Court in the Chancery Division. Their colleagues in the King's Bench Division are all drawn from the ranks of the Bar.—*S.L.J., 1933, p. 37.*

Brawling in Church.—The decision of the Penzance bench of magistrates to dismiss the summonses taken out against twelve persons for brawling in church by disturbing divine service at the churce of St. Hilary, Marazion, the scene of the faculty "raid" last summer is, whatever may be one's view of the alleged reason for the disturbance, an unfortunate one. On the facts it appears to be wrong in law, and we now understand that a case will be stated for the opinion of the King's Bench Division. The charge was brought under S. 2 of the Ecclesiastical Courts Jurisdiction Act, 1860, under which any person guilty of riotous, violent or indecent behaviour in any church or chapel, whether during the celebration of divine service or at any other time, or molesting or disturbing any preacher or clergyman ministering any divine service, rite, or office in any cathedral church or chapel, is liable to a penalty not exceeding £. 5 or imprisonment for two months.

There was uncontradicted evidence of organised interruption and disturbance by about seventy people by singing hymns and otherwise, and the disturbance began, before the actual service commenced, as the officiating priest and his assistants were proceeding to the alter for a sung celebration of Holy Communion. So far as the form of service is concerned, there was no evidence of any particular departure from the Prayer Book, but it would appear that the interrupters were led to expect a form of which they disapproved; and if such a service took place, the noise, according to *The Times* report, was such that not a word of it could be heard in the body of the church. In the meantime the police had been called in and endeavoured to collect the names of some of the disturbers. The magistrates appear to have accepted the defence put forward that the service interrupted was not a divine service according to law. In this respect they would appear to have undertaken a jurisdiction which more properly belongs to the Bishop and the Chancellor of the diocese, and in any event to have misconstrued the Act under which the charges were made, for the section expressly applies to brawling, not only in service time, but at any other time. The fact that, in cross-examination, the priest in charge would not admit the jurisdiction of a secular Court in ecclesiastical matters was irrelevant, though no doubt to the lay mind significant where the assistance of the secular court is being asked; the prosecution was a matter of common law, and it has further been held that provocation or a claim of right is no defence to a charge of brawling: *North* v. *Dickson*, 1 Hagg. Ecc. 730; *Kensit* v. *Dean of St. Paul's* [1905] 2 K. B. 249—*S. L. J., 1933, p. 38.*

The Lawful English Use.—There is however a way by which these deplorable ceremonial disputes in the church can be reasonably settled, and that is by adherence to and acceptance of the principles of the Prayer Book and the ancient English use implied in the Ornaments Rubric. These principles are admirably set forth in the recent judgment of Chancellor Errington in the case of *St. Saviour's, Hampstead*, (1932) P. 134, which well deserves study. The vicar of the parish had introduced six candlesticks on a retable or shelf behind the altar, and objection having been taken, mainly on the ground that two old candlesticks given by a former vicar had been removed, proceedings to obtain a faculty were initiated. The Chancellor in a reserved judgment held that two of the new candlesticks should be retained in use, but disallowed the remaining four. The decision was that the old English use being to place not more than two lights on the Holy Table in service time, this was retained at the Reformation, and is authorised by the Ornaments Rubric,

consequently the use of six lights is unlawful. It might be added that as retables were unknown in pre-Reformation times, the lights should properly be placed on the altar itself and not on any shelf behind it. The Chancellor further held that it was quite lawful and proper to place a crucifix so as to be visible to a penitent during confession—a decision which would have astonished some of the judges of the nineteenth century. It may not perhaps be generally realised that there are not two, but three, different "shools of thought" on these matters—(1) the Protestant view, which regards the Prayer Book as complete in itself, and prohibiting any ornament or ceremony which it does not expressly mention; (2) the extreme Anglo-Catholic view under which many clergy have supplemented the somewhat meagre directions of the Prayer Book by wholesale borrowing from the Roman rite as being easily ascertained; and (3) those Anglo-Catholics and scholarly churchmen who regarding the book as an historical document, authorising the use of an elaborate ceremonial in its proper place, where it is desired, are careful in every detail to adhere to the ancient English use, which now, for the first time, has been definitely approved in a legal decision. The English customs may be studied at Westminster Abbey, and at many other well-known churches in London. Those who would like to study the matter further should read some of the publications of the Alcuin Club, a learned society which has done its best to stem the tide of "Roman imitation."—*S. L. J., 1933, p. 38.*

Pleadings by Counsel.—One of the rulings set out in the annual report of the Bar Council declares that a barrister instructed to draw pleadings should not delegate his responsibility to another. This is no new thing, for as long ago as 1672 in "The Practice Unfolded," a work relating to the Court of Chancery, we read: "No councillor ought to put his hand to any bill or other pleading unless it be drawn or at least perused by himself in the paper draught before it be engrossed." It goes on to say that pleadings should not be "stuffed with repetition of deeds, writings or records in *haec verba*" but should be brief without "tautoligies, multiplications of words or other impertinencies occasioning needless prolixity."—*S. L. J., 1933, p. 45.*

Mr. Glasworthy and the Law.—It is generally known that Mr. John Glasworthy, O.M., whose death on Tuesday last, at the comparatively early age of sixty-five, is universally regretted, was a member of the Bar; and although he never, we believe, attempted to acquire a practice, his works, both dramatic and literary, afford

abundant evidence of their author's legal training and knowledge, and of the fact that he was able to, and did, appreciate the legal bent of mind. Trial scenes are not uncommon in plays, and legal matters are constantly treated of in novels; but it is very seldom that a member of the profession who sees such a play or reads such a novel, does not at once find some obvious error which for him spoils, to some extent, at any rate, the effect. There were no errors of this sort in any of Glasworthy's works; one may, perhaps, say that the sentence inflicted at the close of the trial in *Justice* was not the sort of sentence which would be likely to be passed in these more merciful days; but the proceedings are all technically correct. And if it be observed that, in the scene in the solicitor's office in *Loyalties*, the junior partner is rather more deferential to the head of the firm than junior partners generally are, that is rather a criticism of present-day manners than of the dramatist. By general consent, the greatest achievement of a most distinguished carreer was The *Forsyte Saga*, and the profession will remember that its chief figure, Soames Forsyte, was a solicitor; a carefully drawn, not very sympathetic, yet always in understandable and typical portrait.—*L.J., 1933, p. 74.*

India and the J. C.—One can understand why the people of India, or one or more of the tribes thereof, still regard the Judicial Committee of the Privy Council as a kind of unknown god from whom justice may be expected to come with reasonable hopes of fulfilment. Hard things are spoken of the Judicial Committee here and there and elsewhere in the British Commonwealth of Nations; but in India, generally speaking, no. From that country cometh the praise; and thence come most of the appeals which are still made to the Board in Downing Street.

That the J.C., deserves its Indian reputation may be judged from a perusal of the "judgment" of the Board, delivered a few days ago by Lord Atkin, in the appeal of a doctor and a police officer from the conviction and sentence by the High Court of Justice at Patna on June 4, 1930, that Court consisting of the Chief Justice and two puisnes. One may be hold in Lord Atkin's speech how on occasion the Judicial Committee can dispense justice for justice's sake, without regard of persons, politics or expediency. Dr. Prasad and Mr. Varma were set free, their honour completely vindicated; and both were declared to be the victims of a serious miscarriage of justice. Yet one observed a seeming tardiness: Conviction and sentence, June 4, 1930; the P. C. judgment, January 26, 1933.—*L. J., 1933, p. 81.*

Successive Interests in Chattels.—Formerly a gift by will of chattels for successive interests conferred an absolute interest on the first limited owner, such as a tenant for life. Now, however, with regard to chattels which are not consumed by use of them, successive interests may be created by will so as to confer enforceable legal rights on the second and subsequent donees: (Halsbury's "Laws of England," vol. 28, p. 527). The case of *Re Swan; Witham* v. *Swan* (113 L.T. Rep. 42; (1915) 1 Ch. 829) is an interesting and instructive one on this subject. There, where a testatrix bequeathed certain chattels, including jewellery, to her daughter, with remainder, in the event which happened of the daughter dying childless, to the testatrix's son, and appointed the son and daughter executor and executrix of her will, and on her death in 1895 the daughter took possession of the chattels, but broke up and lost some of them before she herself died childless in 1913, and the son claimed compensation out of his sister's estate for the missing chattels, it was held by Mr. Justice Sargant (as he then was) that as possessor of the articles the daughter was in the position of trustee or bailee for the remainderman, and he was, therefore, entitled to recover by way of compensation out of her estate the amount necessary to restore or replace the articles. The suggestion relating to chattels settled by way of legal limitations in "Fearne on Contingent Remainders," 10th edit., Vol. I, p. 414, namely, that on the executor's assent to the possession of the first taker the latter may "be considered as taking it in trust for the ulterior legatees, subject to his own anterior beneficial interest therein", was approved and adopted.—*L.T. 1933, p. 86.*

Case Law: Is there too much of it.—A year or two ago, Mr. Justice McCardie, who had been generally credited with a profound love for precedents, seeing that he was accustomed to submit them to an elaborate discussion in his learned judgments, startled the profession by a vigorous protest against what he termed the "tyranny of case law," from whose tenacious grip the modern practitioner can escape, if at all, only if he possessed the genius for "distinguishing" decisions that may not appeal to him as in accordance with good sense. One writer, himself a distinguished member of the profession, has said that "it is matter of admiration how lawyers have in all times admitted any precedents and authorities, as if to save them from the dreaded discussion of principles." There is, however, more to be said in favour of adhering to precedent than is suggested by such an observation, for if a point of law has been solemnly decided, it is surely good sense to follow it, at all events, till a superior tribunal or the

Legislature has declared it to be erroneous. Adhesion to precedent tends to uniformity in the law, and as Mr. Edward Jenks has said in his "Book of English Law," the doctrine of judicial precedent keeps judiciary law from arbitrariness. In a lecture delivered last week at University College by Sir Maurice Sheldon Amos, K C., it would seem that that great jurist would range himself alongside Mr. Justice McCardie, in thinking that case law, like the world, "is too much with us." In his view some kind of consorship on reports is essential, but it may respectfully be asked, who is to enact the role of censor? So long as our judicial machine works as it does, it is inevitable that precedent should be heaped upon precedent, not infrequently of cases which on close examination are found to be merely decisions on the special facts of the particular case; but while we may deplore this unnecessary multiplication of decisions, there is still much to be said in favour of the principle of free trade continuing to obtain in the reporting world.—*S. J. 1933, p. 69.*

"Illegal" Profits: Liability to Tax.—The point decided in *S. Southern (Inspector of Taxes)* v. *A. B.*, reported in *The Times* of 2nd February, is of more general interest than is usually the case with income tax proceedings. Briefly, it was held that profits accruing to an individual and to a company in respect of betting transactions—admitted for the purpose of these proceedings to be illegal—arose in the course of carrying on a "trade" within the scope of the Income Tax Act, 1918, and were accordingly assessable for tax purposes under Sch. D, Case I. The evidence showed that the individual in question employed touts who had street pitches where they received slips and money. Shortly before the race a runner took the slips and money to an office, from which the winnings were afterwards distributed. All fines which A. B. and his employees had incurred in the course of some thirty-five convictions duly put in evidence before the Commissioners had been paid by the former. The locality of the office was constantly changed in order to escape the vigilance of the police. In the course of his judgment Finlay, J. said that the question whether or not the findings of the Special Commissioners—to the effect that the Revenue could not lawfully claim income tax on profits made as the result of the non-enforcement of the criminal law—were right depended simply upon whether, on the facts stated, there were "annual profits or gains arising or accruing to any person dwelling in the United Kingdom from any trade, profession, employment, or vocation." Once that were found, tax was leviable unless the prospective payer could bring himself within some

special exemption made by the Legislature. The principles laid down by Rowlatt, J., in *Mann* v. *Nash* (Inspector of Taxes), (1932) 1 K. B. 752, covered this main issue, and the learned judge in the case now being considered expressed agreement with the view of Rowlatt, J., and a preference therefor to the opinion of the Irish Court in *Hayes* v. *Duggan*, (1929) I. R. 406, which appears to be based on the principle that an Act of Parliament should not be construed so as to involve the State taking a profit on a prohibited act which it ought to have prevented. The basic principles applicable to cases of this nature are best given by the learned Judge, who formulated them in *Mann* v. *Nash, supra*. He said: "The revenue authorities, representing the State, are merely looking at an accomplished fact. It is not condoning it, or taking part in it. It merely finds profit made from what appears to be a trade (in this case the provision of automatic machines for use for unlawful gaming), and the revenue laws say that profits made from a trade are to be taxed. Reliance was also placed on the maxim "*nemo allegans turpitudinem suam est audiendus*." I cannot see that the State is alleging its own turpitude in the present case. It is the appellant who is alleging his turpitude. It is also said that the State are coming forward to take a share in the profits of unlawful gaining. That is mere rhetoric. The State is doing nothing of the kind. It is merely taxing the individual with reference to certain facts. It is not a partner or a sharer in the illegality."—*S.J. 1933, p. 69.*

Company Pretending to be a Solicitor.—An unusual prosecution of a limited company under S. 46 of the Solicitors Act, 1932, for wilfully pretending to be solicitors was heard at Bow Street Police Court by Mr. Graham Campbell on 25th January. The defendant company carried on the business of accountants and auditors, and in a letter written by the company to a man who owed money to his tailor there appeared a reference to the tailor as the company's client and also the following sentence: "We shall give you an opportunity to avoid further action provided you accept the enclosed bill and have the same returned to us immediately." The letter was signed on behalf of the company, and the words "Legal Department" were added. The company through its solicitor pleaded guilty, and on its behalf it was stated that the main business of the company was conducted in Scotland, and under Scottish law the phraseology of the letter in question did not constitute any offence. The learned Magistrate fined the company £.10 and ordered it to pay £.10 10s. costs. S. 46 of the Solicitors Act, 1932, provides that "any person, not having in force

a practising certificate, who wilfully pretends to be, or takes or uses any title, addition or description implying that he is qualified or recognised by law as qualified to act as a solicitor, shall be liable on summary conviction to a penalty not exceeding ten pounds for each such offence." It may seem strange that anyone should think it possible for a limited company to sit for The Law Society's examinations and take out a practising certificate, but the words of the section are quite clear, and if there is any implication in a company's "title addition or description" that it is entitled to act as a solicitor, it would seem that an offence has been committed. The question of a limited company's liability to prosecution for criminal offences was dealt with by Mr. Justice Finlay in *R* v. *Cory Bros. & Co., Ltd.* (1927) 1 K.B. 810, where it was held that a limited company cannot be guilty of manslaughter. It seems clear that "acorporation cannot be guilty of treason or of felony" or of perjury or offences against the person—per Lord Denman, C.J., in *Reg* v. *Great North of England Railway Co.*, 9 Q.B. 215. But "a corporation may be indicted for breach of duty imposed upon it by law"—per Patteson, J., in *Reg* v. *Birmingham and Gloucester Railway Co.*, 3 Q.B. 223. It is clear also that a company may be fined—*Pharmaceutical Society* v. *London and Provincial Supply Association* (1880) 5 A.C. 857. A company obviously cannot be sent to prison, although it seems that it may be guilty of crimes for which there are the alternative punishments of imprisonment or a fine. In such a case the Court, of course, imposes a fine.—S.*J. 1933, p. 70.*

What Galsworthy Might Have Been.—It is curious that Mr. John Galsworthy, Barrister-at-Law, should have taken a law degree at Oxford, that he should successfully have performed the prescribed exercises and ritual in legal learning and dining, and gone so far as to have himself published a barrister in Lincoln's Inn at the age of 23: yet never afterwards to have shown any inclination to practise in the profession or uttered one word of regret (so far as is known) by reason of his failure so to do. For it is now declared and admitted on every hand that he would have made a first-rate Judge, the sort of man who would have been quick to see the salient points in a case; one who would probably have been a very sound lawyer; a just Judge, who in criminal causes and matters would have tempered justice with just about the right allowance of mercy. He might, like Maule, J., have delivered a judgment or two which would have made legal reforms inevitable. However, most people, and lawyers not a few, may think

the leading decisions and the Act well lost in the finding of the Forsyte Saga, and especially of Soames.

And there is little doubt that Galsworthy the novelist and playwright is far more famous than Galsworthy J. or L. C. J., or even Galsworthy L. C. could hope to have been. The greatest of Judges do not in life or death receive even in their own country such obituary notice and applause as have been given to Mr. John Galsworthy at home and abroad.—*L. J. 1933, p. 97.*

The Judge-Maker.—Lord Sankey, during his terms of office as Lord Chancellor, has made a few judges, and he will be responsible for the making of a few more; but neither he nor any other Lord Chancellor can compare in this respect with that Lord Halsbury who was first editor of the *Laws of England.* Lord Halsbury was not addicted to reforms. Lord Sankey is that way inclined; but as Judge-maker Lord Halsbury left other L. Cs. standing.

Some time before his last Chancellorship came to an end there were only two occupants of the Bench who did not owe the appointments they were then holding to his selection or recommendation. Wills, J. and Kennedy, J., were the two. By the year 1904 he had made as many as as twenty-eight Judges, and if Law Lords and Lord Justices (for whom the Prime Minister was technically responsible) are included in the list, the total of the Halsbury creations amounted to thirty-two. There is no valid reason why they should not be included, for Prime Ministers, as a rule, are generally guided, often wisely, by the views of the Lord Chancellor, in exercising this right to nominate Law Lords and Lord Justices for His Majesty's approval.—*L. J. 1933, p. 97.*

Drugs and Alcohol in Germany.—The drug problem in Germany, probably owing to its large land frontiers, until recently gave the authorities considerable anxiety. On the 1st of April, 1931, an ordinance was promulgated which imposed very severe restrictions on the use of drugs of addiction. The medical profession co-operated by submitting to provisions which would possibly have been strongly resisted by their colleagues in other countries. A doctor who prescribes more than 0.2 g. of morphia or 2 g. of opium a day for a patient must record every prescription in a morphia book, and substitute preparations must be used whenever possible. Dr. P. Wolff, editor of the *Deutsche medizinische Wochenschrift* and one of the leading experts of the League of Nations in this field, explained recently in a lecture before the Society for the Study of Inebriety that as a result of this ordinance the consumption of morphia had fallen about 20 per cent.

and that of opium by about 30 per cent. Heroin, which plays so large a part in addiction here and in other countries, is hardly used in Germany at all. Similar restrictions on the use of cocaine by the medical profession have resulted in a decrease in its consumption by more than 50 per cent., and the authorities hope to stamp out cocainism altogether. The alcohol problem has been treated in the same determined way: the Licensed Premises Act of July, 1930, had as its object to prevent the sale of alcohol to intoxicated persons and young persons under eighteen, and on sports grounds, and to prohibit the sale of tobacco to children under sixteen. The granting of licences is made dependent on the demand; opening and closing hours are defined, and the sale of spirits may be prohibited at certain times, such as pay-days and election days. The treatment of drunkenness is systematically organised through the whole country, and legislation is shortly to be introduced by which a judge may order an inebriate to undergo withdrawal treatment and supervision.—*S. J. 1933, p. 90.*

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Millions in the Scales.—A High Court judge, even working on a reduced salary, must feel the godlike majesty of his office when called on to determine the fate of a £37,000,000 claim as was Luxmoore, J., recently in the Grand Trunk Railway Case. Still, in these upper regions of calculation, a far more spectacular judgment was given in 1855, when Judge Thompson of the High Court of California awarded John Sutter £40,000,000 damages against over 17,000 trespassers on his estates, £5,000,000 against the State Government and £10,000,000 against the Federal Government of the United States. Sutter's vast territories comprised the sites of San Francisco and Sacramento. There he lived in princely state owning great herds of cattle and keeping a private army to overawe the Indians. Then gold was discovered on his land and all his property rights were violated in the ensuing rush. The action which he won took him four years to prepare, but it availed him nothing. The enraged mob ravaged his estates, burnt the San Francisco Court House and tried to lynch Judge Thompson who had to run for his life. After years of futile effort to obtain justice at Washington, Sutter died a pauper outside the Capital.—*S.J. 1933, p. 97.*

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The Concealment of Names.—In referring last week to a case relating to income tax on illegal profits, in which the defendant's name had been suppressed, we noticed that no explanation of this suppression had been given; nor, so far as we are aware, has it

yet been given, But, as *The Spectator* pointed out in last Saturday's issue, there is rarely anything to be said for the suppression of names in Court, except in blackmail cases It is of the essence of English justice that trials should be in public, and, except where the Legislature has otherwise directed, that all the proceedings, including the names of the parties, should be open to publication. It was stated by the Attorney-General that an order had been made that the name of the defendant should be kept secret, and the Judge is said to have remarked that the order had not been made by him, but he described it as "an order by which all concerned are bound". We quote the words from the *Spectator.* But who has authority to make such an order? It can hardly be the Inland Revenue Commissioners, though it seems probable that it was they who purported to do so. And if they purported to make such an order, it certainly did not bind the Court. The suppression of the name of a party can only be justified as a part of the procedure of the Court. We should have thought that all this was quite plain. The Court had no jurisdiction to try the case unless the name was disclosed., That, we take it, is self-evident. And only the Judge could direct the name to be suppressed. Either the Attorney-General or the Inland Revenue Commissioners should give an explanation of the matter.—*L.J. 1933, p. 105.*

Party Politics and Charity.—We are perhaps approaching a time when the party system, which has dominated the politics of this country for two or three centuries—and if we go back to the factions of the Red and White Roses, much longer—will have come to an end, and Government will be national in fact as well as in name. When that time comes, a gift for the commemoration of a national statesman, and for education in national principles will, no doubt, be charitable, and will gain the benefits appropriate to that character. It will not be hurt by the Rule against Perpetuities, and it will be exempt from income tax—assuming that in that Augustan Age there will be such a tax. But at present we still live under the party system, and gifts which are for a party and not for the State have not that quality of general benevolence which the law requires in a charity. Hence Mr. Justice Finlay has been constrained to hold in the case of the *Bonar Law Memorial Trust* (*Times*, 28th ult.) that the Trust is not a charity, and is not exempt from tax. True, it supplies education in political and social science. But, in substance, so the Special Commissioners held, and Finlay, J., agrees with them, the Trust commemorates an eminent Conservative leader, and promotes the principles of the

Conservative party; and its educational functions are only subsidiary. Even "patriotic purposes" are not charitable: *Attorney-General* v. *National Provincial and Union Bank of England* (*Re Letley*) (1924, A. C. 262); though a gift "to my country, England", answers the test: *Re Smith* (1932, 1 Ch. 153); which shows how fine is the distinction between what is a charitable gift and what is not.—*L. J. 1933, p. 106.*

The Public Trustee on Trusteeship.—A paper prepared by Sir Oswald Simpkin, the Public Trustee, and read recently at a London meeting of the Incorporated Secretaries Association, contained strong criticisms of private trustees. He emphasised that "the losses caused by honest muddling and incompetence are just as grave as those caused by actual fraud, if not even graver. Many private trustees are apathetic and indolent, if nothing worse." Sir Oswald proceeded to give some interesting statistics explanatory of the growing work of his own department. The annual turnover in respect of capital and income is now about 60,000,000*l*. Last year the only claim against the office was one for 26*l*.! The Department administered 18,500 wills and trusts. The nominal value of the funds under its control is approximately 215,000,000*l*., in addition to landed property, of which much had never been accurately valued, but which might be taken roughly at 50,000,000*l*. It had, at a guess, something like 200,000 beneficiaries, and is distributing something like 10,000,000*l*. a year in income alone. In addition to cases now under administration, the office has administered and completely wound up a further 11,500 cases, making a total of approximately 30,000 wills and trusts, with an aggregate value close upon 340,000,000*l*. "Trusteeship" added Sir Oswald, "is often regarded as a perfunctory task, but trusteeship of that character could not be swept away too soon. It opened the door to all sorts of muddles and mistakes, sometimes even to fraud and robbery, and it lulled beneficiaries nto a sense of security from which there might be a rude awakening."—*L.J. 1933, p. 106.*

Scrutton, L. J., Caps It.—Our legal annals contain several examples of swift litigation in criminal cases; arrest, trial and execution between sunrise and sunset and so forth; but the speed possible in civil cases was not fully appreciated until the revelation of Scrutton, J., a few days ago. His statement, so clear and unequivocal, is not yet universally accepted, not because the incredulous people have any doubt as to the integrity of the Lord Justice, but because they are not sure whether he has the dates right or

whether, maybe, the Monday was in one week and the Tuesday in another. Here is the statement: "The New Procedure has not yet reached the standard of the Commercial Court. In my time we issued a writ on Monday and obtained judgment on Tuesday. I was counsel in the case."

Counsel in the case before the Court of Appeal was understood to indicate, in a boastful sort of way, that his action was begun on July 6, 1932, and that judgment had been given by the New Procedure Judge on July 29—"23 days later," counsel added, so that there should be no misunderstanding as to the pace. But the Lord Justice was not impressed; and why should he, when in his young days he had a case in which the speed was twenty times as fast; and in which, so far as we know, the record-breaking judgment of the Commercial Court was not the subject of an appeal. But it cannot have been usual, even in the speedy and naughty 'nineties, for trial and judgment to follow so swiftly upon the writ.—*L. J., 1933, p. 116.*

A Fair and Courteous Judge.—All members of the profession, barristers and solicitors (and there are many), who have conducted cases before His Honour Judge Harrington, profoundly respect him as a Judge and love him as a man. Their sorrow at the illness which overtook him on the Bench is correspondingly sincere, and they profoundly hope that he may soon be restored to health. He has never spared himself in discharging the onerous duties of County Court Judge, and his illness is largely due to overwork.

It is comparatively easy for a High Court Judge to maintain an attitude of judicial calm and to hear without manifest impatience the arguments, good and bad, which may be addressed to him at length; and to listen with composure to wandering witnesses. For the County Court Judge with a multitude of cases, the facts of which he must often himself elicit, it is not so easy; and that is why, no doubt, some County Court Judges appear to be bad-tempered, irascible and rude. Judge Harrington is one whose character has proved superior to such adverse circumstances; his courtesy is constant; and he not only renders justice to the best of his good ability, but plainly appears to plaintiff and defendant to be doing so.—*L.J., 1933, p. 116.*

BOOK REVIEWS.

MALABAR TENANCY ACT WITH A CRITICAL AND ANALYTICAL COMMENTARY, by Mr. T. Govindan Nair, B.A., B.L., Vakil, Chowghat.

The Malabar Tenancy Act is a fairly difficult Act to construe and there is no case-law to assist the practitioner. In the circumstances, light from whatever quarter must be welcome. A not unsuccessful attempt is made in the book with the available materials to make the provisions of the Act intelligible. The Introduction gives the history of the legislation which, as is well known, is a long one. The Appendices give the Statement of Objects and Reasons and the forms. We have no doubt the profession will find the book useful.

A HANDBOOK OF CRIMINAL PROCEDURE, by Mr. S. Ranganadha Iyer, B.A., B.L., Advocate, Madras. Price Rs. 5.

Mr. Ranganadhaiyar is not a person unfamiliar to the profession. It is no exaggeration to say that his Criminal Procedure Code has become the feature of the Library of every lawyer and every Court in the Presidency. The present is an abridged edition of his book brought up to date for the benefit of apprentices preparing for their examination and practitioners while on their legs and we have no doubt that the book will abundantly serve that purpose. As an introduction Mr. Ranganadhaiyar has printed the lectures he recently delivered to the apprentices. Therein he gives a clear exposition of the history and the provisions of the Act. The selection of cases (which, in the preparation of such books, is the most difficult part of the process) has been very judicious. As a ready referencer, practitioners will find the book very useful and if one may venture on a prediction, students might soon find it an indispensable book.

Basiruddin Ahmed[1].) On the merits of the application we are not satisfied that the discretion vested in the District Judge has been wrongly exercised by him. In these circumstances we dismiss this miscellaneous appeal with costs." The earlier decision of the same High Court in *Sinnaswami Chettiar* v. *Aligi Goundan*[2] was not brought to the notice of their Lordships and the judgment, crisp as it is, leads us to examine the soundness of the Calcutta decision in *Abdul Razak* v. *Basiruddin Ahmed*[1]. In that case the petition for adjudication was dismissed and the insolvent preferred an appeal under S. 46 of the Act of 1907 to the High Court. During the pendency of the appeal some of the insolvent's creditors had taken out execution of their decrees, and one of them had actually applied for the issue of a warrant of arrest. The insolvent thereupon applied to the High Court for *ad interim* protection. The point was whether the High Court had the power as an appellate Court under S. 47 of the Act of 1907 to grant *ad interim* protection. In holding that it had such power, their Lordships observed, "To put the matter in another way, an *ad interim* order made by a Court of Appeal is merely the exercise by it, for a limited time and purpose, of its wider power to make an order of the same description in reversal or modification of the order of the Court of first instance. Now, in the case before us, if the appeal is ultimately successful, the Court will make the order of adjudication which should have been made by the Court of first instance under S. 16 of that Act and the effect of the order will be that the whole of the property of the insolvent will become vested in the Court or in a Receiver, the insolvent if imprisoned, will be released, and no creditor, to whom the insolvent is indebted in respect of any debt provable under the Act will have any separate remedy against his property or person. It is manifest therefore that this Court may, on the principle just explained, make an *ad interim* order affording the petitioner protection against proceedings by any creditor taken for the enforcement of any debt provable under the Act; in other words, the Court in passing such *ad interim* order makes by anticipation as it were for a limited time and purpose the order which it is competent to make at the final hearing of the appeal under S. 46 read with S. 16—by cl. (6) of which section it will relate back to and take effect from the date of the presentation

1. (1910) 14 C. W. N. 586. 2. (1924) 47 M. L. J. 530.

of the petition of insolvency." It is doubtful if this reasoning of their Lordships will apply to a case arising under the present Act V of 1920. In *Jewraj Kharewalla* v. *Lalbhai Kalyanbhai*[1], a case decided under the present Act, the question was left open, although Page, J., observed that even if the Insolvency Court passed an *ad interim* order of protection in the exercise of its inherent powers, His Lordship would not interfere under S. 115 of the Civil Procedure Code, 1908.

The law therefore as regards the point under consideration is, that the Insolvency Court can, in the exercise of its inherent powers, grant *ad interim* protection. This, it is submitted, is not correct in view of the provisions of the present Act. If we examine the point a little closely, it will be seen that the word "protection" occurs only in S. 31 of the Act. S. 23 provides for release from arrest or imprisonment only if the debtor is under actual arrest or imprisonment in execution of a decree for the payment of money. Hence, as observed by Page, J., in *Jewraj Kharewalla* v. *Lalbhai Kalyanbhai*[1], there is no provision in the Act in respect of orders to prevent the arrest of a petitioner pending the hearing of a petition for insolvency. The question therefore is whether S. 5 of the Act of 1920 read with S. 151, Civil Procedure Code, 1908, can be construed to confer on an Insolvency Court the power to grant *ad interim* protection. S. 5 of the Act of 1920 opens with the expression "subject to the provisions of this Act" which obviously means that the powers conferred by that section are not to be exercised in such a way as to be in conflict with the powers conferred by other provisions of the Act. Ss. 23 and 31 no doubt confer certain powers on the Insolvency Court under certain circumstances but as regards the power to grant *ad interim* protection against a threatened arrest before adjudication, the Act is silent. Apparently therefore the decided cases already referred to are obliged to resort to the inherent powers of an ordinary Civil Court provided for in S. 151, Civil Procedure Code, 1908. The Calcutta case, *Abdul Razak* v. *Basiruddin Ahmed*[2], was decided under the Act of 1907, which provided by S. 16 for automatic release of the debtor from liability to arrest or imprisonment in respect of a debt provable under the Act, as soon as the order of adjudication was passed. The other three cases, two of the Madras High Court, and one

1. (1926) 30 C. W. N. 834. 2. (1910) 14 C. W. N 586.

of the Calcutta High Court, decided under the present Act of 1920, do not carry the point further. The learned Judges in *Sinnaswami Chettiar* v. *Aligi Goundan*[1] merely observe that neither the state of affairs contemplated by S. 31 nor by S. 23 of the present Act had arisen in that case, and that therefore there was no necessity to grant protection at that stage. The decision in the later Madras case, *Nallagatti Goundan* v. *Ramana Goundan*[2], merely follows the ruling of the Calcutta High Court in *Abdul Razak* v. *Basiruddin Ahmed*[3], decided under the Act of 1907. The learned Judges in *Jewraj Kharewalla* v. *Lalbhai Kalyanbhai*[4], decided under the present Act, leave the question open, and the earlier Calcutta case, *Abdul Razak* v. *Basiruddin Ahmed*[3], has not even been referred to.

It is doubtful if when construing the powers conferred by a special enactment the inherent powers of an ordinary Civil Court under S. 151, Civil Procedure Code, 1908, can be invoked. Besides nowhere in the Civil Procedure Code, 1908, or even under S. 151 of that Code, has the Court been held to have the power or inherent power to grant protection to a debtor against his arrest after a decree is passed and before execution is taken out. It may be that the ordinary Civil Court can, under S. 151, Civil Procedure Code, 1908, or any other section of the Code, stay the execution of a decree, but that cannot mean that an Insolvency Court constituted under a special enactment has the like power before adjudication unless such power can reasonably be inferred from S. 5 or from the other provisions of the Act. The Legislature in enacting S. 28 of the present Act, which is a reproduction of S. 16 of the old Act of 1907, has omitted the word "person" which occurred in cl. (2) of the old section, and provided under S. 31 for protection against arrest only after adjudication. The automatic protection which under the old Act the insolvent obtained upon adjudication was abolished, and S. 31 made it necessary for him to apply to the Court for protection. The intention of the Legislature is therefore clear that if at all the Insolvency Court has power to grant protection from arrest, it can grant such protection only after adjudication or under the circumstances mentioned in S. 23, unless the question of protection from arrest before adjudication is taken

1. (1924) 47 M L. J. 530.
2. (1924) 47 M. L. J. 783.
3. (1910) 14 C. W. N. 586.
4. (1926) 30 C. W. N. 834.

to be a question "of any nature whatsoever" within the meaning of S. 4 of the present Act.

S. 9, cl. (1) of the English Bankruptcy Act, 1914, confers express powers on the Bankruptcy Court to stay after the presentation of a bankruptcy petition, any action, execution or other legal process against the property or person of the debtor, and hence under the English Bankruptcy Law, the Bankruptcy Court has power to grant protection from arrest before adjudication. There being no corresponding provision in the Provincial Insolvency Act V of 1920, it is too much to infer from S. 5 or any other provision of that Act that the Insolvency Court has any such power. The Presidency Towns Insolvency Act also does not appear to confer any such power on an Insolvency Court, notwithstanding the provisions contained in Ss. 18 and 18-A of that Act. S. 18 of the Presidency Act enables the Insolvency Court to stay ***after the making of an order of adjudication*** any suit or other proceeding pending against the insolvent. S. 18-A of the said Act merely enables the Court to stay any ***insolvency proceeding*** pending against the debtor in any other Court subject to its superintendence although power to stay such proceeding can be exercised after the presentation of an insolvency petition and before adjudication.

In this state of the law on the point, either the Legislature should intervene by enacting a provision similar to S. 9, cl. (1) of the English Bankruptcy Act or the question should be set at rest by an authoritative pronouncement preferably of a Full Bench.

M. V. RAMASWAMI IYER, B.A., B.L.,
Vakil, Tinnevelly.

CRITICAL NOTES.

VENKATACHALAM PILLAI *v.* SETHURAM RAO, (1932) 64 M. L. J. 354 (F. B.), KOLATHU AYYAR *v.* RANGA VADHYAR, (1912) I. L. R. 38 Mad. 114: 24 M. L. J. 84 AND AVULA CHARAMUDI *v.* MARRIBOYINA RAGHAVALU, (1915) I. L. R. 39 Mad. 462: 28 M. L. J 471.

(Application of the Rule against perpetuities to contracts for sale, re-sale, etc.)

The above question left open by the Full Bench in *Venkatachalam Pillai* v. *Sethuram Rao*[1] would seem to admit of a

1. (1932) 64 M. L. J. 354 (F. B.).

confident answer in the light of two judgments of the Privy Council.

The rule against perpetuities is enacted in S. 14 of the Transfer of Property Act, and in determining whether a particular provision falls within or outside the permitted bounds, it is well settled that regard is to be had to possible contingencies and not to actual events as they turn out. In other words, if the future event on the happening of which the disposition is contingent, is not absolutely sure of happening within the sanctioned period, and if there is the least possibility that the event may not happen within that period, the disposition fails on the ground of remoteness.

Till the 1st of April, 1930, when the Amendment Act XX of 1929 came into force, nothing in the second chapter of the Transfer of Property Act (which includes S. 14) could affect any rule of Hindu Law; that is to say, any rule of Hindu Law which was inconsistent with the provisions of Chapter II was saved by S. 2 as it stood before the amendment; but where the Hindu Law was silent, the provisions of Chapter II were applicable to Hindus.

Does the Hindu Law contain any doctrine of perpetuities? Is the principle of S. 14 of the Transfer of Property Act applicable to contracts of sale by Hindus? The observations thereon by Sir Bhashyam Aiyangar in *Ramasami Pattar* v. *Chinnan Asari*[1] furnish a convenient starting point for discussion. He pointed out that though the doctrine of perpetuities has no place in Hindu Law, the principle underlying it is not foreign to Hindu Law. By reason of the decision in the Tagore case, the power is under the Hindu Law even more restricted than under the English doctrine of perpetuities and the same limitation has been applied by the Privy Council to transferees for consideration (*Chundi Churn Barua* v. *Sidheswari Debi*[2]).

As regards contracts, the decision in *London and South Western Railway Co.* v. *Gomm*[3] rests on the principles that a covenant to convey, though it does not run with the land, binds the land, and creates an equitable interest in the land in favour of the person entitled to call for a conveyance, and that the rule against perpetuities is applicable as much to executory

1. (1901) I. L R 24 Mad. 449 at 467 to 470
2. (1888) L. R. 15 I. A. 149: I.L.R. 16 Cal. 71 (P.C.).
3. (1882) 20 Ch. D. 562.

equitable estates in land as to legal estates. Noticing a possible distinction on the ground that a contract for the sale of land does not under the Indian Law create any interest in the land, Sir Bhashyam Aiyangar went on to observe that there is really no substantial difference between the English and the Indian Law in respect of contracts of sale of immovable property, and it does seem reasonable and in accordance with principles of general jurisprudence that there should be some limit of time beyond which the performance of contracts for the transfer of property by way of sale, pre-emption or otherwise must not be allowed to be held in suspense or postponed. "Although S. 14 deals only with transfers, the provisions of that section," he said, "could in some cases be practically defeated if covenants are not held to be void for remoteness on the ground that by themselves they create no interest in property".

The learned Judge considered that it would be revolutionary to follow in this country the decision in *Gomm's case*[1], and yet he foreshadowed the way of revolution. Indeed, the revolution has been accomplished beyond challenge by the decision of the Privy Council in *Maharaj Bahadur Singh* v. *Balchand Choudhury*[2]. The case arose in the mofussil, and related to a contract (of 1872) which was entered into 3½ months before the date on which the Indian Contract Act came into force. The judgment of the Privy Council (which was pronounced in 1920) goes on the implied footing that the Hindu Law on the point is substantially the same as the English Law; in other words, the rule in *Gomm's case*[1] was held applicable to Hindus on general principles of justice, equity and good conscience.

In compromise of a litigation, the proprietor of a hill had agreed with a Society of Jains that if the Society should require a site thereon for the erection of a temple, he and his heirs would grant a site free of cost. The proprietor afterwards alienated the whole hill and the Society, by their representative, sued the alienees for possession of a site defined by boundaries.

The Board observed:

"If the case be regarded in the light of an agreement to grant in the future whatever land might be selected as a site for a temple, as the only

1. (1882) 20 Ch. D. 562.
2. (1920) L. R. 48 I A. 376; 6 Pat. L. J. 163 (P.C.)

interest created would be one to take effect by entry at a later date, and as this date is uncertain, the provision is obviously bad as offending the rule against perpetuities, for the interest would not then vest *in presenti*, but would vest at the expiration of an indefinite time which might extend beyond the expiration of the proper period."

Under the Indian Law, a contract of sale (or re-sale or pre-emption) of immovable property does not, of itself, create any interest in, or charge on, such property (S. 54, Transfer of Property Act); and so, the text of S. 14 (Transfer of Property Act), literally interpreted, cannot apply to such a contract not amounting to a transfer. "The law of India knows nothing of the distinction between legal and equitable estates: by that law there can be but one owner" (*Rani Chhatra Kumari Devi* v. *Mohan Bikram Shah*[1]). Even so, the Privy Council have not flinched from applying to Hindus the rule in *Gomm's case*[2] and that was because they considered that the rule was founded upon "the wide basis of equity and good conscience, which have always been pillars of the administration of justice in India" (*Tara Kumari* v. *Chandra Mauleshwar*[3]). The expression "justice, equity and good conscience" (appearing in the Civil Courts Acts of the various provinces) has been interpreted to mean the rules of English Law so far as they are applicable to Indian society and circumstances (*Waghela Rajsanji* v. *Shekh Masludin*[4]). An Englishman would naturally interpret the expression as meaning such rules of English law as he happened to know and considered applicable to the case (Ilbert).

Reference may here be made to S. 32 of the Contract Act which provides that

"Contingent contracts to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened; if the event becomes impossible, such contract becomes void".

and to the enactment in S. 23 that

"The consideration or object of an agreement is unlawful, if it is of such a nature that, if permitted, it would defeat the provisions of any law".

Suppose there is a transfer of property by *X*, a feminist, to take effect (without further formality) so soon as the British Premiership comes to be held by a woman,—the transfer is void on the ground of remoteness; for, the contemplated event is not inherently sure of happening within the period sanc-

1. (1931) L. R. 58 I. A. 279 at 297 : I L R. 10 Pat. 851 at 869, 870 : 61 M L. J 78 at 89 (P. C.)
2. (1882) 20 Ch. D. 562.
3. (1931) L R. 58 I. A. 450 at 455: I L R. 11 Pat. 227 at 233: 62 M. L. J. 60 (P C.).
4. (1887) L. R. 14 I A. 89 at 96 : I L. R. 11 Bom. 551 at 561 (P. C).

tioned by the law, and there is some possibility of its not happening within 18 (or 21) years of the expiry of all the lives now in being on this globe. That being so, a *contract* by *X*, the feminist, to transfer property so soon as the British Premiership comes to be held by a woman, would, if permitted, defeat the well-established law of perpetuity; and good sense, good logic and good law require that such a contract should be deemed void and refused specific performance even as between the original contracting parties (*Kalachand Mukherji* v. *Jatindra Mohan Banerji*[1]); citing *Maharaj Bahadur Singh* v. *Balchand*[2], *Ramasami Pattar* v. *Chinnan Asari*[3] and *Kolathu Ayyar* v. *Ranga Vadhyar*[4] among other cases; see also *Dinkarrao Ganpatrao* v. *Narayan Vishwanath*[5]; but contra *Aulad Ali* v. *Ali Athar*[6].

Dealing with S. 6 (*a*) of the Transfer of Property Act, the Privy Council have endorsed the Madras view that it would be futile to forbid transfers of expectancies if *contracts* to transfer them are to be enforced as soon as the estate falls into possession; and such contracts have been declared void under S. 23 of the Contract Act, on the ground that, if permitted, they would defeat the provisions of S. 6 (*a*) of the Transfer of Property Act (*Annada Mohan Roy* v. *Gour Mohan Mullick*[7] approving *Sri Jagannada Raju* v. *Sri Rajah Prasad Rao*[8]). That line of reasoning applies to the case now on hand.

The legislative changes in the Hindu Law effected by the Hindu Transfers, Bequests and Disposition of Property Acts of 1914, 1916 and 1921 and the more recent enactment of 1929 by which Chapter II of the Transfer of Property Act supersedes the Hindu Law on all matters covered thereby,—these are striking tokens of India's appreciation of the English doctrine of perpetuities. The rule in *Gomm's case*[9] is a salutary part of that doctrine. In 1920, the Privy Council upheld the rule as good for India; and the High Courts at Bombay and Calcutta have followed that ruling in *Kalachand Mukherji* v. *Jatindra Mohan Banerji*[1] and *Dinkarrao Ganpatrao* v. *Narayan Vishwanath*[5].

K. C. G.

1. (1928) I. L. R. 56 Cal. 487 at 493 to 505.
2. (1920) L. R. 48 I. A. 376: 6 Pat. L. J. 163 (P. C.).
3. (1901) I. L. R. 24 Mad. 449.
4. (1912) I. L. R. 38 Mad. 114: 24 M. L. J. 84.
5. (1922) I. L. R. 47 Bom. 191 at 204 to 218.
6. (1927) I. L. R. 49 All. 527 (F. B.).
7. (1923) L. R. 50 I. A. 239: I. L. R. 50 Cal. 929: 45 M. L. J. 617 (P. C.).
8. (1915) I. L. R. 39 Mad. 554 at 558 to 560: 28 M. L. J. 650.
9. (1882) 20 Ch. D. 562.

CORRESPONDENCE.

SECTION 19, CLAUSE (XIV) OF THE COURT-FEES ACT AND ITS APPLICATION TO BATTA MEMOS FOR SUMMONING WITNESSES IN THE CIVIL COURTS.

Till the advent of the Court-Fee Examiners in the year 1929, to moffusil Courts for inspection, batta memos for summoning witnesses were not treated as applications required to be affixed with Court-fee stamp to the value of twelve annas; since then, every subsequent memo to the first is treated in the nature of a second application, not coming within the exemption provided for under clause (*xiv*) of S. 19 of the Court-Fees Act and Court-fee stamp to the value of twelve annas is insisted on being affixed to the batta memos, evidently under Article 1, Schedule II of the Court-Fees Act. But this practice does not seem to be uniform in all the Civil Courts in the Presidency.

Apart from the fact, namely, that some Courts do not insist on every second batta memo for summoning witnesses being affixed with Court-fee stamps to the value of twelve annas. Uniformly, the variance in different Courts causing perplexity to the clients who have work in two or more Courts, let us examine the provisions of law to see whether the innovation is warranted.

Clause (*xiv*), S. 19 of the Court-Fees Act reads thus: "Nothing contained in this Act shall render the following documents chargeable with any fee—First application (other than a petition containing a criminal charge or information) for the summons of a witness or other person, etc., etc. . . . ". As per Rule 50, sub-rule (1) of the Civil Rules of Practice a party who desires the attendance of any witness shall bring into Court a list of the persons in Form No. 20. In Form No. 20, as found in Vol. II of the Civil Rules of Practice and Circular Orders issued by the High Court of Judicature at Madras for the guidance of Subordinate Civil Courts in the Presidency, 1928 Edition, there is a request to the Court that the summons may be issued. Is the inclusion of the word "request" to be construed as a prayer and is such a list to be construed as an application coming under Article 1 of Schedule II of the Court-Fees Act.

In O. 16, R. 1 of the Civil Procedure Code, 1908, the wording is " the parties may obtain, on application

to the Court or to such officer as it appoints in this behalf, summonses to witnesses". The application is not numbered as any interlocutory application. The Court does not pass any orders on the list of witnesses. Notice is neither ordered nor given to the opposite party, as is required to be given in the case of interlocutory applications. The Court is bound to issue the summons, excepting, in the exercise of its inherent power under S. 151, Civil Procedure Code, to prevent the abuse of its own powers, in extraordinary circumstances, it may refuse to issue the summons. The said refusal cannot be appealed on, independently of any appeal, that may be made on the Court's decision in the subject-matter of the suit or proceeding. The reasoning, that because the word employed in the Civil Procedure Code is an "application" cannot therefore warrant the levy of Court-fee of twelve annas in some Courts for every subsequent list of witnesses.

The construction that is put upon the words "application," "list" and "memo" in this connection is not the same by the ministerial officers of different Courts. The Court-Fee Examiners remark that every second or subsequent list of witnesses should be treated as not coming under the exemption provided for under clause (*xiv*) of S. 19 of the Court-Fees Act and cannot be allowed to be understood differently for different Courts. There must be uniformity in observance.

Before an original suit in a moffusil Munsif's Court reaches the stage of trial, the parties have to apply for summons to witnesses at least half a dozen times. The life of an original suit in such Courts may without fear of contradiction be taken as extending for one year. It would, therefore, be throwing additional burden on the already impoverished litigants if every time he applies for summons for witnesses he is compelled to pay application fee of twelve annas.

It is therefore necessary that there should be a finality in the matter and the practice in vogue prior to the advent of the Court-Fee Examiners in not treating the list as an application requiring Court-fee should be restored.

N. S. GURUSWAMI,
Pleader, Koilpatti.

SUMMARY OF ENGLISH CASES.

THOMAS *v.* OCEAN COAL COMPANY, LIMITED, (1933) A. C. 100.

Workmen's compensation—Injury from accident—Breach of statutory regulation—Accident if "arising out of and in the course of" employment—Meaning of.

A hitcher whose work was to be in charge of the pit bottom, attend to the winding signals, close and open the gates, and help so far as necessary in getting full trams and empty trams into and out of the cages, crossed the pit bottom to see to the proper working of empties towards the main road and dashed back to cross under the descending cage towards his proper working side in order to be ready to receive that cage when it landed; but while crossing the pit, the cage descended on him and killed him. Though passing from one side to the other was one of the things he was engaged to do, it was in contravention of statutory regulation to pass across the pit bottom when the cages were working. The act of the workman was for the purposes of the employer's business. The widow claimed under the Act for compensation but the Court of Appeal and County Court Judge dismissed the claim holding that by acting contrary to the regulation, he added a serious peril and that placed him out of the scope of the employment.

Held, (by the House of Lords) that notwithstanding the fact that the workman was acting in contravention of the statute when the accident happened, yet the injury must be deemed to have arisen out of and in the course of his employment under S 1, Sub-S. (2) of the Workmen's Compensation Act, 1925. The proper course is to ascertain if, disregarding the prohibition, the injury was due to an accident arising out of and in the course of the employment. The question is if at the time of the accident the workman had stepped outside the sphere of his employment or whether he was still within that sphere, although acting in contravention of a statutory and employer's prohibition.

Garrallan Coal Co. v. *Devlin*, (1927) A. C. 59 and *Wilsons and Clyde Coal Co.* v. *M'Ferrin*, (1926) A. C. 377, followed.

Stephen v. *Cooper*, (1929) A. C. 570, distinguished.

WESTMINSTER BANK, LIMITED *v.* OSLER (INSPECTOR OF TAXES), (1933) A. C. 139.

Income-tax—Bank—Conversion of War Bonds to Conversion Loan and War Loan—Profits by such conversion—If taxable.

The Bank held large investments in National War Bonds of various issues. The Government offered to exchange those bonds

into 3½ per cent. Conversion Loan stock at the rate of 134*l*. for each 100*l*. nominal value of National War Bonds or into 5 per cent. War Loan, 1929-47. The Bank exchanged its National War Bonds some into Conversion Loan and some into War Loan and increased the value of its investments. The question was whether in arriving at the profits for income-tax assessment, the increased value should be taken into consideration.

Held, that the exchange effected in the circumstances was the exact equivalent of what would have taken place had instructions been given to sell the original stock and invest the proceeds in the new security. The investment represented by the original War Bonds came to an end as soon as the new securities were taken in its place, when a new venture was begun in relation to the new holding. There has been a realisation of the security. This is not equivalent to mere exchange of an item in the stock in trade of a trader. The profit was therefore assessable to income-tax.

Royal Insurance Co. v. *Stephen*, (1928) 14 Tax Cas. 22, approved.

In re WILLIAM METCALFE AND SONS, LIMITED, (1933) 1 Ch. 142.

Company—Voluntary liquidation of—Preference and ordinary shares—Surplus assets after payment of all liabilities inclusive of paid-up capital to shareholders—Preference shareholders if entitled to share therein pari passu *with ordinary shareholders.*

A company registered in 1897 carried on business with a capital of 24,000*l*. divided into 2,400 10*l*. shares, of which 1,000 were preference and 1,400 were ordinary shares. In 1928 it sold the business and resolved to be wound up voluntarily. The dividend on preference shares had been paid down to date, but no dividend was paid since 1918 on ordinary shares. After payment of debenture debt and other debts of the company, the paid-up capital was also paid off. There remained a surplus available for payment to shareholders; the bulk of which was attributable to accumulated profits. By clauses 5 and 12 of the articles, the preference shareholders were entitled to a fixed cumulative dividend of 5*l*. per cent. per annum upon the capital paid up thereon and the return of their capital in priority to the ordinary shareholders.

Held, that nevertheless the preference shareholders were also entitled to share equally with the ordinary shareholders in the surplus. Preference shareholders are members of the company and as much shareholders in it as the ordinary shareholders are, and they must be treated as having all the rights of shareholders except so far as they have renounced those rights on their admission to

the company. Mere priority advantages cannot be taken as an implied renunciation by them of their other rights

Per *Romer, L.J.*—"Supposing that you find the statement in the memorandum and articles of a company that the preference shares shall confer a right to a preferential fixed dividend of so much per cent. during the first five years of the company's existence, and nothing more is said about the rights of the preference shareholders to dividend, it would be impossible in my opinion to argue that as from the expiration of those five years the preference shares did not rank in respect of dividend *pari passu* with the ordinary shares."

BRADSTREETS BRITISH, LTD *v.* HAROLD MITCHELL AND CARAPANAYOTI & CO., LTD., (1933) 1 Ch. 190.

Contract—Mercantile Inquiry Agency—Confidential reports to subscribers—Condition to keep report secret—Indemnity for damages by disclosure—Action for libel—Agency made liable—Claim against the subscriber on indemnity—Liability of—Clause if valid.

The plaintiff company was carrying on the business of a mercantile inquiry agency, the course of the business being to furnish reports to subscribers on the financial position of companies, firms or persons engaged in trade. It was a condition that the subscribers should keep the report secret and only for his exclusive use and the subscriber indemnified the company in respect of any loss or damage it may suffer from the breach of the condition by the subscriber or his employees. The defendant company became a subscriber and enquired about the reputation of X & Co., whose agents the defendants were. The report was unfavourable. This report *C*, the managing director, communicated to *M*, a co-director. *M* in his private capacity applied to be made and became a subscriber of the plaintiff company, on the false representation that he had a private business of his own. *M* in that capacity then applied for information about X & Co. The plaintiff gave the same report, which *M* communicated to *C*. *C* then as X & Co.'s representative instructed *X's* solicitors. X & Co. thereupon issued a notice to the plaintiff, who wrote to the defendant company and *M* withdrawing the report and asking for its return. *X* sued plaintiff for libel and recovered damages. The plaintiff thereupon sued the defendant company and *M* for damages and on the indemnity clause.

Held, that the defendant company did not disclose the report to any person other than its solicitors for advice, that *M* and *C* individually joined together to make *M* a subscriber, get the report and disclose it to *X*, that they were not thereby acting as

defendant's agents, that defendant company was not therefore liable for breach of contract. *M* is liable for the breach. The agreement to indemnity was not void as opposed to public policy. It is not a contract to indemnify against the result of a libel published by *M*, but one by *M* not to disclose information, with a provision for indemnity in respect of damage or loss which may be incurred from the breach of the contract by *M* not to disclose.

Weld-Blundell v. *Stephens*, (1920) A. C. 956, discussed and followed.

M cannot be made liable for the damages given in the libel actions, for that damage did not arise directly or indirectly out of any act of *M* but *M* is liable for damages resulting from his own breach of contract.

In re SCIENTIFIC POULTRY BREEDERS ASSOCIATION, LIMITED, (1933) 1 Ch. 227.

Companies Act, 1929—Ss. 4 and 5—Company—Limited by Guarantee—Objects encouraging and improving scientific methods of breeding etc. poultry—Memorandum of Association—Prohibition against remuneration to Governing Body members—Increase of business—Special resolution granting remuneration—Application to sanction the resolution—If Court can sanction the alteration of the Memorandum.

An association was registered under the 1908-17 Companies Act as a company limited by guarantee with the object of improving breeds of poultry and promoting more scientific methods in feeding, housing and breeding poultry. The memorandnm of association prohibited the payment of any remuneration or the division of any profits among the members of the Governing Body. The business and membership of the association so greatly increased in course of time that the Governing Body found that they were unable to bestow sufficient time unless they were paid for it. A special resolution of the General Body meeting was passed altering the memorandum by permitting remuneration to the members of the Governing Body to a certain extent. An application was then taken out by the association under S. 5 to sanction the alteration.

Held, by the Court of Appeal (reversing Eve, J.) that it having been found that the alterations are desirable and put forward by the company in good faith, and that they are desirable for more efficiently carrying on the main objects of the company which are left unaltered, the alterations came within the scope of S. 5. Sub-s. (1), even though they do alter the character of the company in this sense, that for the first time the members will be entitled to receive remuneration or a share of profits. It is only if the alteration is of such a character as substantially to alter the main object

for which the company was formed, that the Court ought not to sanction it.

In re JACKSON. BEATTIE *v.* MURPHY, (1933) 1 Ch. 237.

Will—Ambiguity in—Two legitimate and one illegitimate nephew of the same name—Bequest to " my nephew A. M."—Evidence if admissible to identify the nephew.

A testatrix *J.* by her will devised and bequeathed the residue of her estate after payment of legacies, debts, etc., to " my brothers . . . . . my sisters. . . . . . and my nephew Arthur Murphy in equal shares".

At her death it was found that the testatrix had three persons who apparently answered the description " my nephew *A. M.*". Two of them were legitimate sons of two of her brothers and the third was an illegitimate son of a sister. One of the nephews was resident in Australia for 17 years and had visited the testatrix during his visits to England. His father was not on good terms with the testatrix. The other nephew was living in England and known to the testatrix but his father had a share under the will and as he died during *J.'s* lifetime, the nephew was entitled to that share. The illegitimate nephew had married a niece of *J.* and the testatrix used to call him her nephew and was called " aunt " by him. During the latter part of her life, he had managed her financial affairs and in a previous will *J.* had described him as "my nephew *A M.*, son of my sister *M. M.*".

Held, that the illegitimate nephew took in the circumstances. If there had been one legitimate nephew only named *A. M.* that nephew would undoubtedly have taken the legacy, and no evidence at all as to the existence of the illegitimate nephew would have been admissible. But as soon as it appeared from the evidence that there is more than one nephew of that description, the Court is entitled to have evidence of the state of the family generally, and to be put to some extent in the position of the testatrix in order to ascertain not what she intended but what the words which she has used were intended to mean.

In re *Fish*, (1894) 2 Ch. 83, distinguished as a case where there was only one legitimate claimant and consequently no ambiguity.

In re WILLIAMS. WILLIAMS *v.* PAROCHIAL CHURCH COUNCIL OF THE PARISH OF ALL SOULS, HASTINGS, (1933) 1 Ch. 244.

Will—Construction—Gift to husband absolutely "knowing that he is fully aware of my intention"—Discussion of will before

S

husband—Silence of husband—Husband aware of her intentions—If intentions enforceable.

Mrs. *W* made a will in the following terms: "I give and bequeath everything . . . . . to my dearly loved husband *G. A. W.* absolutely, knowing that he is fully aware of my intention that at his death all my possessions are to be sold and given to All Souls Church, Clive Vale, Hastings . . . . . I am aware of my husband's intention to bestow his possessions at his death on the same All Souls Church . . . . " The will was in her own hand. It was read out by her solicitor in the presence of her husband. She referred to the intention expressed in her will and discussed its contents with her solicitor. The husband was present at the whole of the interview and heard what took place. The husband did not object to it. The wife predeceased her husband and the husband later died intestate. The question arose if the will conveyed the property to the Church or went to husband's next of kin on his death.

Held, that the husband knew that his wife's desire was that at his death her property should go in the particular way which she indicated; and by his silence he must be taken to have agreed, not merely to be bound by the terms of the wife's will, or to give effect to the dispositions of it, but must be taken to have agreed to carry out his wife's wishes. The husband therefore took the property burdened with that obligation and it is an obligation which the Court will enforce, by declaring that the property of the wife to which the husband was entitled under the will belongs to the Parochial Council in question.

In re HANLON. HEADS *v.* HANLON, (1933) 1 Ch. 254.

Will—Construction — Proviso for defeasance of vested interest in a certain event, namely, marriage or association with a specific named person—Validity of.

By his will, a testator bequeathed certain property to his widow during her life or widowhood, and on her decease or re-marriage to his children, a son and a daughter in equal shares but subject to the proviso, namely, that if the daughter should intermarry with a certain person *A B* (named in the will) or should live with him as his wife, although not married to him, or should misconduct herself with him in any manner, or should leave home with the intention of living with him, or should be delivered of a child or children of whom the said *A B* should be the father, then in any of those events, the bequest in her favour should be absolutely forfeited and void. There was no gift over in the event of the condition above referred to taking effect. The question was raised if the defeasance clause was effective or purely ***in terrorem*** or void either for uncertainty or otherwise.

Held, the conditions were not void for uncertainty, nor are they *in terrorem*. The fact that there is no gift over does not make it *in terrorem*; for there is here a clear desire of the testator to revoke the gift in those events.

In re WILLIAM C. LEITCH BROTHERS, LTD. (No. 2), (1933) 1 Ch. 261.

Company—Winding up—Fraudulent carrying on of business by director—Declaration of Court to that effect—Recovery of moneys from director—How distributable—Companies Act, 1929.

In the winding up of a company, the Court found as a fact that from March 1, 1930, the company was carrying on business with intent to defraud the creditors, and that it was so carrying on business to the knowledge and under the direction of a director. The Court thereupon made an order under S. 275, Companies Act, 1929, that the said director was personally liable to the extent of 6000*l*. The liquidator recovered from the director 3356*l*. on account of the 6000*l*. and asked for directions from Court as to how he ought to deal with the amount, whether they formed part of the general assets of the company available for all the creditors or distributable only to those creditors with whom debts were contracted during the period when the business was being carried on with intent to defraud.

Held, that though the liability is measured by the debts of the defrauded creditors, yet it was not by itself a ground for holding that the ordinary rules of *pari passu* distribution of assets should be departed from and a preference created in favour of the defrauded class. The amount should be dealt with by the applicant as general assets.

CRUSE *v.* MOUNT, (1933) 1 Ch. 278.

Landlord and Tenant—Lease of an unfurnished flat—No warranty of fitness for habitation.

In regard to an unfurnished flat there is no warranty or implied condition as in furnished houses that the flat is reasonably fit for occupation. Were the matter *res integra,* the case of a flat may be treated as of a special character but *Manchester Bonded Warehouse Co.* v. *Carr,* 5 C. P. D. 507, was an authority against it.

ISRAELSON *v.* DAWSON (PORT OF MANCHESTER INSURANCE COMPANY, LIMITED, GARNISHEES), (1933) 1 K. B. 301.

Practice—Procedure—Garnishee order—If can be made when debt disputed—Motor car insurance—Third party risks—Decree against assured for accident by him—If judgment-creditor can

attach the claim under the policy—Such claim if a debt due to the assured.

The plaintiff was knocked down and injured by a motor car in the possession of the defendant. The defendant was insured under a policy whereby the insurance company had agreed to "indemnify the insured . . . as regards all sums for which the insured . . . shall become legally liable to pay in respect of . . . . . accidental bodily injury to any person . . . . " The plaintiff obtained a judgment for 150*l*. as damages for his injuries and proposed to garnish the claim under the insurance policy as a debt due to the defendant.

Held, that in order to found jurisdiction to make any order for attachment or for the trial of an issue as to the debt, the applicant must first establish that there is in law a debt due from the garnishee to the judgment-debtor. As between the assured and the underwriter there is no debt. There may be a breach of contract or an obligation to indemnify him against such payment as he may have to make but that is not a debt which can be attached.

KOCH *v*. DICKS, (1933) 1 K. B. 307.

Bill of Exchange—Alteration of place where the bill was drawn from London to Germany—Result to make it a foreign bill —Alteration without acceptor's consent—If a material alteration avoiding the bill.

D, an English merchant, bought some wireless apparatus from a Radio Co. in Germany and, for the price of these, accepted certain Bills of Exchange drawn in London. The bills were endorsed by the Radio Co. to *K*. who had financed that Company. As the German Bank refused to discount the bills unless they were drawn in Germany, the place of drawing was altered by the drawer himself from London to Deisslingen and thereby the bill became a foreign bill.

Held, that as the alteration of an inland bill to a foreign bill alters to some extent the rights and obligations of the parties to the bill, the alteration after the bill was complete was a material alteration and as it was effected without the assent of the acceptor, the acceptor was discharged under S. 64, Bills of Exchange Act. It is immaterial whether the alteration of the bill makes it more or less favourable to the holder who seeks to enforce the obligations, if in fact it alters the legal incidence of the bills.

Foster v. *Driscoll*, (1929) 1 K. B. 470, distinguished as a case where the alteration of the place was made while the bill was an incomplete instrument, a purported English bill on unstamped paper, with no time for payment filled in.

BUCKLAND *v.* THE KING, (1933) 1 K. B. 329.

Petition of Right—Detinue by Crown's servants—Petition if lies—Packet of cinematograph films—If a "baggage of passengers" within S. 66, Customs Consolidation Act, 1876.

The suppliant who was a producer of operatic films produced in Berlin films of six operas, packed the films in six separate parcels, each in a cardboard box, and registered them through from Berlin to Victoria Station, London. The suppliant travelled by the train by which the parcels were sent. On landing at Victoria the Customs officers detained the parcels and informed the suppliant that they were liable to duty and as they were not duly entered, they would be forfeited unless the duty was paid. After some years of correspondence, the suppliant (addressee of the parcels) launched a petition of right, claiming the return of the films or their value and damages for detention.

Held, that the detention was lawful, as the parcels were not "baggage of passengers" within the meaning of S. 66 of the Customs Consolidation Act, 1876 and therefore liable to duty.

A petition of right lies against the Crown in respect of goods *wrongfully* detained by its servants. It would be a grave state of affairs if a subject were destitute of remedy where the servants of the Crown wrongfully detained his goods.

VANBERGEN *v.* ST. EDMUNDS PROPERTIES, LTD., (1933) 1 K.B. 345.

Contract—Debt—Agreement to pay the debt to solicitor's account in bank—Payment into bank likewise—If valid agreement—Debt if discharged by such payment.

The plaintiff, a trader, was indebted to the defendants in the sum of 208*l*. for costs under judgments and he entered into an agreement with the defendants' solicitors by which they agreed that if the plaintiff would pay the amount of the debt in cash into a bank at Eastbourne for the credit of the solicitors in London, that payment would satisfy all sums which the plaintiffs owed them. The plaintiffs so paid the amount but nevertheless the defendant issued a bankruptcy notice to be served on the plaintiff. In an action by the plaintiff for damages,

Held, that the payment into the bank discharged the debtor. The agreement so to accept it was not *nudum pactum* and the debt having been so discharged, the bankruptcy notice was unjustified and the defendants were liable to damages to the plaintiff which must be reasonable and temperate.

JOTTINGS AND CUTTINGS.

China, Japan, and the Covenant.—The Covenant of the League of Nations was, according to its preamble, made "in order to promote international co-operation and to achieve international peace and security by the acceptance of obligations not to resort to war"; and it provides for the steps to be taken in the case of a dispute between Members of the League "likely to lead to a rupture." This is Art. 15, and the steps prescribed by that Article are now being taken at Geneva, though the authors of the Covenant could hardly have anticipated that one of the disputants would—as Japan now—be at the same time enforcing its claims by arms. The earlier paragraphs of the Article provide for a Report by the Council on the dispute; but under a later paragraph, the Assembly may be substituted for the Council, and that course has been adopted. The Assembly have, with practical unanimity, adopted their Committee's Report on the occupation of Manchuria by Japan, and that Report is adverse to Japan. Then "any member of the League represented on the Council may make public a statement of the facts of the dispute, and of its conclusions regarding the same." This step also has been taken, and Japan has made a statement on her own behalf: "The Assembly stands, if it may be so said, for mere formulæ—Japan for solid realities." And so, the pleadings being closed—China has already entrusted her case to the League—and one party having already taken the issue into its own hands, it remains to be seen what resources remain at Geneva. Meanwhile, Great Britain has given a lead to the rest of the world by placing an embargo on the export of arms to the East, though this is defective in that it saves existing contracts; and that it applies to China as well as Japan, and thus confounds the innocent with the guilty. It can only be justified on the ground of prudence.—*L. J., 1933, p. 141.*

So many Silks.—The last batch of silks (not excluding the supplementary list) has increased the number of K. C.'s once more to the number of more than 300. The list includes the names of County Court Judges and magistrates who in earlier days were called within the Bar; but allowing for these and other successful men, including those who, like Sir Harold Morris, Mr. Wingate-Saul and others, hold quasi-judicial and other offices of profit under the Crown, there remain a formidable crowd of silks who are plying, more or less successfully, for hire.

Suppose for the moment (and only for the moment) that there are thirty Judges continually functioning during the working days of the year and 250 K. C.'s always available for work in

Courts in which a silk might with propriety appear in his capacity as leader. If silks were engaged in Court as fully as these Judges, it would appear that of the 250, seventeen silks only (or thereabouts) would be required, allowing two for each of the Judges aforesaid. It looks bad for the majority; especially when one observes that there are silks who appear simultaneously in two or more cases in different Courts; and that the number of cases in which no silk is briefed, and when juniors are left to carry on the fight single-handed, is lamentably large. On the other hand, we know that silks do much good work in chambers; that none is continuously employed in Court; and that the remuneration earned by those who are only engaged on a casual or part-time basis is sufficient to meet their more urgent needs.—*L. J., 1933, p. 149.*

Concerning Ceremonial and other Matters.—For many years now the number of K. C.'s has remained more or less constant, not varying much above or below the total of 300. Compare this with the total of 14 K. C.'s in the second half of the eighteenth century, of 28 in 1850. Fifty years ago the number was 200, and in the early part of the present century the number had increased to 270.

In the main the latest silks are men whose practice and professional standing at the Bar marked them out for such promotion; but, as in almost every previous case, the mode of granting and withholding of patents is not wholly understood. Why, it is asked, should Robinson, who has enjoyed a large practice for many years, be denied that which is granted to Jones, who never had one?

And might not the ceremonial business be simplified or otherwise improved? Instead of this marching round to every occupied Court, and then being invited, individually, to " move," might there not be a single ceremonial in the Court of the L. C. J., with all the puisnes present and correct? It would be much more impressive. The weary pilgrimage from Court to Court is not impressive, and is a nuisance to all concerned.

And again: Why not abolish the custom of informing all one's seniors of the Circuit Mess that it is one's intention to apply to the Lord Chancellor for silk? The evils resulting from this custom have been enumerated time and again; while its advantages (if any) are far to seek.—*L. J., 1933, p. 149.*

How to Slander Lawyers and Clergymen.—Many years ago there appeared in *Scribner's Magazine* an article (written by a lawyer) entitled " Some Precepts for Slandering Safely "; wherein the following passages appear, Holt and Yelverton being cited as the authorities. To follow them implicitly might be dangerous now.

"You can call a clergyman a dunce, a blockhead, a fool, for it does not injure him in his profession. The Court held that one can be a good parson and a great fool; but otherwise of an attorney. It has been adjudged that to call a justice of the peace blockhead, ass, etc., is not a slander for which an action will lie, because—note the distinction—he was not accused of any corruption in his employment, or any ill-design or principle; 'And it was not his fault,' said the Court, 'that he was a blockhead, ass, etc.; for he cannot be otherwise than his Maker made him; but, if he had been a wise man, and wicked principles were charged upon him when he had them not, an action would have lain; for though a man cannot be wiser, he may be honester than he is.'

"You can say of a lawyer, 'He has as much law as a monkey,' because he hath as much, and more also. But if you say, 'He hath no more law than a goose,' then are these words actionable. You can say, 'He is a common barrator and deserves to be hanged,' for the words 'He deserves to be hanged' are too general and extravagant to found an action on; because it was not shown what action was done to deserve hanging. The words 'Honest lawyer,' spoken ironically of an attorney, were held actionable."—*L. J., 1933, p. 155.*

Libel and Innuendo.—As stated, it would be unwise to assume that the law of defamation stands exactly where it did. Irony is still a most dangerous ingredient in any statement of dubious intent. Take, for example, the action brought by Thomas Casement against the *Daily Express* in the High Court at Dublin last week. The statements, or some of them, alleged to be defamatory were, if made and intended literally, not obviously libellous. "Tom Casement leaned on the polished marble top of a Dublin bar and critically examined his hat. Tom Casement is well-known throughout the Free State. He is the brother of Sir Roger Casement, executed for his part in the Irish Rebellion of 1916, when Tom was serving with the British Forces in South Africa. He is a good mixer and a true democrat." Of his hat it was written: "A wonderful hat, battered, weather-beaten and grey-green with age. Once I was chatting to Tom when the hat was whisked off his head and sent below on the hotel kitchen lift."

Geoghegan, K. C., for the plaintiff, said the words meant and were understood to mean that the plaintiff, a very distinguished Irishman, was drunken, dissolute and debauched, incapable of managing himself or his affairs, that if the words were true they would make the plaintiff appear, to the injury of his credit and reputation, "an utter buffoon, and a mere stage Irishman." This was denied by Fitzgerald, K. C., for the defendants. But the present

position is that Hanna, J., has entered judgment for the plaintiff for 500*l.* damages and costs, and refused a stay of execution pending appeal.—*L. J.. 1933, p. 155.*

Silks' Former Privileges.—Down to the reign of William IV., those appointed King's Counsel enjoyed certain privileges, or rather received certain perquisites, owing to the fact that they were then considered in a more real sense than is now the case, counsel of His Majesty, although the title still rather indicates that they are in the service of the King. Each silk in the old days received a salary of £40 and with this amount he also received a number of brief bags which he distributed among his junior friends who had shown themselves professionally worthy of this honour, for honour it was considered, as at that time a junior barrister was by the etiquette of the profession precluded from carrying a bag until he had been given one by a silk. In addition to receiving a salary, such as it was, and a supply of brief bags, the King's Counsel had likewise an annual allowance of stationery and quill pens, so that on the whole he did pretty well. Then came the period of reform, not only in that which concerned the representation of the people, but reform in the matter of national expenditure, and in the wave of economic retrenchment the various allowances and perquisites to which the possessors of silk gowns and others were entitled, were now swept away. Thereafter, a King's Counsel had to provide himself and at his own costs and charges with his stationery and quill pens, and there resulted also as a consequence the new practice of the junior Bar providing themselves with their brief bags in which to stow their papers. So much for the privileges formerly enjoyed by silks.—*L T., 1933, p. 171.*

Their Obligations.—What were some of these? First, as being counsel for the King, they could not, without a licence, appear against the Crown, and although this licence was granted as a matter of course it involved a small payment which in due time figured in the bill of costs with which the client was faced at the conclusion of the litigation. That particular obligation has now been dispensed with. Another obligation from which present-day silks are exempted, but by which their predecessors were bound, was the obligation of obtaining a certificate that they had taken the sacrament. Lord Campbell tells us that he well remembered the time when barristers, who had not been to church for many years, on being appointed King's Counsel used to go to St. Martin's Church, pay their guinea, and bring away the certificate of having taken the sacrament according to the rites and ceremonies of the Church of England. Not only on being appointed

silks had members of the Bar to comply with this requirement; all who obtained any judicial appointment were compelled to qualify in the same way. Serjeant Robinson tells us in his reminiscences that one of the veteran Old Bailey practitioners of his youth— Curwood by name (the same who was sued under the pseudonym of "Benedict" in the well-known cases of *Montagu* v. *Benedict* and *Seaton* v. *Benedict* for debts contracted by his wife, regarding whom he once confided to a brother practitioner that "if you were to rake the infernal regions with a small tooth comb, you would not find a woman with a tongue and temper as Mrs. Curwood")—was appointed a Commissioner of Bankruptcy, and as such he was required to take the sacrament within six months under certain pains and penalties. Curwood was not given to church-going, and so put off the ceremony as long as possible. One day, however, when passing a church and seeing several persons going in, he bethought him of getting his certificate. He went in, sat down in a pew, and without paying the least attention to what was going on, took out some papers and began to read them. When the service was over he went into the vestry and asked the clerk for a certificate. "A certificate for what, sir?" asked the clerk. "Well," answered Curwood, "I don't know much about it, but I have lately obtained an appointment, and I understand it is necessary I should get a certificate that I have attended—well, I believe, it is the sacrament" "Sacrament," exclaimed the clerk. "Why, lord love you, sir, you have just been churched!" The repeal of the Test Act removed this obligation, which in so many cases, such as that of Curwood just mentioned, had degenerated into something very like a farce.—*L. T., 1933, p. 171.*

Judges' Work out of Court.—It has been whispered, whether truly or not is uncertain, that one of the recommendations likely to be made by the committee recently appointed by the Lord Chancellor to inquire if, and how, greater expedition may be imported into the proceedings of the courts, is that the judges should sit longer hours than they do at present. It is true that their predecessors sat longer, but experience showed that this was not conducive to good work, and gradually a shorter working week was introduced. Some people seeing a judge rise at, or shortly after, four o'clock may be inclined to quote the refrain of Mr. T. W. Connor's humorous verses, "And his day's work is done," but in so thinking they would think wrongly. Few are aware how much of a judge's work has to be done after court hours. There are judgments to be considered and written, and this of itself occupies much time. Lord Justice Scrutton writes

all his judgments with his own hand, and in view of the number of points taken in the Court of Appeal these judgments frequently run to considerable length, a fact which shows that no little time must have been devoted to their preparation. The same may be said with regard to the considered judgments of several other occupants of the Bench. One other matter with which a judge has to occupy himself, and which can only be done after court hours, is the keeping abreast of case law. Many years ago the late Lord Bramwell, then Baron Bramwell of the Court of Exchequer, gave evidence before a commission which had been appointed to inquire into the working of the legal machine—such an inquiry seems to be called for every decade or so—and he included among the judges' duties the reading of the reports. He said this: "Lord Wensleydale told me, and my own judgment goes with it, that no judge can do his duty who does not read the reports. . . . When I was at the Bar I did not read them, and I didn't pretend to read them, and my clients knew that I didn't read them, and they took me for better or worse. But I can't serve the public in that way, and I read them now diligently and they require time." He went on to say that he did not confine his reading to one set of reports, because, as he pointed out, "you may find that one reporter is struck by one remark which he puts down and while writing it, not being an accomplished shorthand writer, something escapes his attention which the other reporter puts down." With the increased output of reports, the ground for judicial studies after court hours of those who follow the example of Lord Bramwell, and it is believed many of the present-day judges do follow it, is largely extended.—*L. T., 1933, p. 172.*

The U. S. President.—One of the peculiarities in the working of the political machine in the United States is that some time elapses between the election of the President and his formal entry upon his office. As everyone knows, Mr. Roosevelt was chosen President a month or two ago, but only on Saturday last was he formally inaugurated. Another peculiarity is the fact that the person chosen as President receives no official notification of his election, nor any commission or certificate of the result of the count: he notifies himself of the honour done him, and presents himself at Washington on the 4th March to take the oath of office, this being usually administered by the Chief Justice of the Supreme Court. The tradition followed is for the new President to call upon his predecessor and the latter returns the call very shortly afterwards. Occasionally in the past there was some little friction between the outgoing and the incoming President, and in one instance the

latter declined to call upon the former, and not unnaturally the outgoing President equally declined the customary call, and indeed took a horseback ride in the suburbs while the guns were booming out welcome to the new chief of the State. *Tantaene animis caelestibus irae.*—*L. T., 1933, p. 194.*

His Cabinet.—Another marked difference between American practice and that which obtains among us is in the number of those constituting the Cabinet. Complaints have been frequent in this country that the Cabinent is so large as to be both expensive and unwieldy. Discussing this subject in his monograph on Walpole, the late Lord Morley said that nowadays the number of Ministers almost necessarily included in the Cabinet has grown so large that it seems as if the result must inevitably be the formation of an interior junto, small enough to allow of deliberation and decision at close quarters. This, as he pointed out, would be no more than a return to the system of Walpole's time—a large Cabinet, but the effective body composed of himself, the Chancellor, and the two Secretaries of State. We have not quite come to that, but it is worth noting that our kin beyond sea have always favoured small Cabinets, although there, too, new developments have necessitated an increase in the number of those who sit at the official table with the President. As the late Benjamin Harrison, who had himself filled the office of President, remarked: "The 'cabinet maker' who designed the table did not allow for the growth of the official family." The President presides at Cabinet meetings; on his right sits the Secretary of State as the most important of his lieutenants; on his left sits the Secretary of the Treasury; next to the Secretary of State is the Secretary of War; and opposite to him is the Attorney-General, who appears to be always included in the Cabinet, in this again differing from the usual practice among us, although, as may be remembered, there have been several instances in recent years where the Attorney-General has been made a member of the Cabinet. Among the other members of the Cabinet in America are the Postmaster-General, the Secretary of the Navy, and the head of the Department of Agriculture. Of all these the Secretary of State is the chief, sometimes being called the head of the Cabinet, and, in fact, he is so in matters of ceremony and in the order of succession to the presidency, for he succeeds to that office in the event of the death of the President and the Vice-President. It says much for the good sense of those called to the office of President that more than once the choice of the Secretary of State has been of the man who was the chief competitor of the successful candidate. Lincoln,

for example, chose as his Secretary of State Seward—a brave act, it was said, because Lincoln could not fail to know that for a time Seward would overshadow him in the popular esteem; and it was a wise act because Seward was the best qualified at the time for the great and delicate duties of the office.—*L. T., 1933, p. 194.*

The Indian Proposals.—Nearly three years have passed since the Report of the Indian Statutory Commission, of which Sir John Simon was Chairman, was issued. That Report went beyond the original scope of the inquiry, and dealt not only with the Provinces, but entered on the larger question of the Federation of the Provinces and the States in a single Government. "The ultimate constitution of India," the Commission said "must be federal, for it is only in a federal constitution that units, differing so widely in constitution as the Provinces and the States, can be brought together, while retaining internal autonomy." This extension of the task of the Commission has been accepted both by the British Government and at the Sessions of the Round Table Conference in September, 1930, and a year later; and in December, 1931, it was endorsed by both Houses of Parliament. The Proposals which have now been issued by the Government for the consideration of Parliament are intended to establish an All-India Federation. Federation elsewhere, it is pointed out, has usually resulted from a pact entered into by a number of political units, each possessed of sovereignty, or at least of autonomy, and each agreeing to surrender to the central organisation which the pact creates an identical range of powers and jurisdiction, to be exercised by it on their behalf to the same extent for each one of them individually, and for the Federation as a whole. The most familiar instance of such a Federation is afforded by the United States. But in India the process will be reversed. The Government, now centralised, will be decentralised, and its functions distributed among the Provinces and the States, except such as are retained at the centre; and as regards the retained functions, these will be exercised by the Governor-General, some on his own responsibility, and some on the advice of his Ministers. In short, the tendency is centrifugal, and not, as in the United States, centripetal.—*L. J., 1933, p. 194.*

A Federal Court.—A written Constitution requires a court to interpret it. "In a Constitution," say the Proposals, "created by the federation of a number of separate political units, and providing for the distribution of powers between a Central Legislature and Executive on the one hand, and the Legislatures and Executives of the federal units on the other, a Fede-

ral Court has always been recognised as an essential element. Hence a Federal Court is to be established, and this will have both an original and an appellate jurisdiction. Under its original jurisdiction, it will determine "justiciable" disputes between the Federation and any Federal unit, or between any two or more Federal units, involving the interpretation of the Constitution Act, or any rights or obligations arising thereunder. But the limitation to justiciable disputes is not required. Official draftsman use the word too readily. All the matters specified are appropriate for determination by a Court of Justice. And there will be an appeal to the Federal Court from any High Court or State Court on the like questions. It is proposed that an appeal shall lie without leave to the Judicial Committee from a decision of the Federal Court in any matter involving the interpretation of the Constitution, but in any other case only by leave of the Court, unless special leave is granted by the Judicial Committee. As to the establishment of a Supreme Court, to hear appeals from the Provincial High Courts, Indian opinion, it is said, is far from unanimous, and this is left over for the present. Such a Court would intercept appeals to the Judicial Committee and, in general, render them unnecessary. Except under very special circumstances, litigation might well reach final decision in India.—*L. J., 1933, p. 194.*

Damages in Divorce.—Recent reports in the daily newspapers tell us that large sums are being awarded in the Divorce Court as damages to injured husbands. Some people may think that juries are forgetting the old rule (of which they are no doubt always reminded) that it is not their function to punish the co-respondent for what he has done. The rule was carefully stated by Sir James Hannen in *Darbishire* v. *Darbishire and Baird*, (1890, 62 L. T. 664), where he declared that the jury should aim not at punishing the co-respondent, but at compensating the husband for what he has lost. Wives, however (like husbands), vary greatly; when the time comes to estimate their value in pounds, shillings and pence, there are difficulties which no man, and no jury, can face with confidence. Reading between the lines of Lord Merrivale's judgment in *Langrick'* v.*Langrick and Funnell*, (1920, P. 90, 89 L.J. (P.) 114), one may, perhaps, see a change of view, and say that a co-respondent who has behaved with particular cruelty or recklessness of the husband's rights, should pay heavily—as heavily as he can. The question is one of mixed law and morals. Juries who are really shocked by the wickedness of one who has broken up a happy and decent home, will, we believe, give verdicts which express their

resentment. They may decline as impossible the task of assessing the value of a wife. And if they are duly warned of their duty, it is very difficult for the Court of Appeal to interfere. To do so, they must value the wife, or wives generally, themselves.—*L. J., 1933, p. 195.*

Lord Tomlin of Ash.—Lord Tomlin, the Lord of Appeal in Ordinary, has come back and down to the Chancery Division, and continues to play the part of a puisne in the place of Bennet, J., who has gone to the aid of the King's Bench Division. It will be recalled that Tomlin, J., was one of the few (Lord Wright and Lord Blackburn were others) who were promoted direct from the position of puisne to the Lords, over the heads of the Lords Justices of Appeal. He did not take the place of any other Lord; for it was he who was made seventh Lord of Appeal in Ordinary under the power conferred by sec. 2 of the Appellate Jurisdiction Act of 1929—the Act which, by sec. 1 thereof, for the first time in history, authorised the payment of salaries to two members of the Judicial Committee of the Privy Council and imposed an age limit of seventy-two.

Since his descent from the Lords, Lord Tomlin's most notable judgment is that delivered *In re Ogden*; *Brydon* v. *Samuel,* where he held that a gift by will of the testator to Sir Herbert Samuel of 4 per cent. of the testator's residuary estate "to be by him distributed amongst such political federations, associations, or bodies in the United Kingdom (other than those in the said will mentioned) having as their objects, or one of their objects, the promotion of Liberal principles in politics, as he shall in his absolute discretion select, and in such shares and proportions as he shall, in the like discretion, think fit"—is a valid and effectual gift.—*L. J., 1933, p. 206.*

Alone.—It is curious that Northern Ireland has no Solicitor-General: one law officer is accounted enough. Yet in a much smaller jurisdiction, that of the County Palatine of Durham, they have not only an Attorney but a Solicitor-General.

And while in England His Majesty's Law Officers may no longer indulge in private practice, Mr. Babington is not so hampered; and enjoys the liberty of action enjoyed until fairly recent times by his English counterpart. It will be remembered that Sir Edward Clarke strongly opposed Sir Richard Webster when the old order was changed: "The question of income," said Sir Edward, "does not weigh with me a single moment; but as a member of a great profession, taking much interest in its fortunes

and pride in the position which I have been allowed to hold in it, I feel certain that the proposed changes will produce a greater expenditure of public money without any increase of public efficiency, and will, at the same time, injuriously affect the position of the Law Officers with regard to their brethren at the Bar."

By the way, what is the "pillow of the Attorney-General" in Northern Ireland? In England it was Chief Justiceship of the Common Pleas; later it became alternative—the Lord Chief Justiceship or a Law Lordship. In Northern Ireland it would be, if one may judge from brief history, a Lord Justiceship at the least.—*L. J., 1933, p. 211.*

Salary and Fees.—When Bacon was Attorney-General he had a salary of 81*l.* 6*s.* 8*d.* a year, but his fees as Attorney were more considerable. "I shall now again make oblation to your Majesty," he wrote to King James I, "first, of my heart; then of my service; thirdly, of my place of Attorney, which I think is honestly worth 6,000*l.* per annum." That he must have derived almost the whole of his income from fees is pointed out in Norton-Kyshe's *Law Relating to the Attorney-General and Solicitor-General.* It is there he mentions that the actual salary of the Attorney was 81*l.* 6*s.* 8*d.*; the Solicitor's, 70*l.*; the King's Serjeant's. 41*l.* 6*s.* 10*d.*; and the King's Advocate's, 20*l.*—*L. J., 1933, p. 211.*

An Irish to a Scottish War Lord.—Although the Lord Chief Justice of Northern Ireland is entitled to sit as a member of the Judicial Committee, because he is a Privy Councillor who holds high judicial office, Ireland is at present without representation amongst the seven Lords of Appeal in Ordinary who receive 6,000*l.* a year (less cuts) in respect of their judicial services in the House of Lords, and who sit without extra remuneration on the Judicial Committee of the Privy Council. Five of the seven are of English legal extraction—though Lords Atkin and Russell are of Irish antecedents, and Lord Blanesburgh hails from Scotland. Lords Wright and Tomlin are "pure" English. Lords Thankerton and Macmillan are Scottish in law and ancestry.

Lord Thankerton is the son of that Lord Watson who was also a Lord of Appeal, and whose talkativeness the Irish Lord Morris and Killanin, also of appeal, could not abide. It is recorded of Lord Morris that once, on the conclusion of a long appeal, he solemnly recommended Lord Watson to follow the advice given by a parish priest to a talkative woman—to take a sup of holy water in her mouth, sit still, and take care not to swallow it. Lord Watson's reply, if any, is unknown.—*L. J., 1933, p. 211.*

Montaigne's Encomium on the Chinese.—At the moment when happenings in China have turned the eyes of the world to that distant land, it is interesting to find that Montaigne, who did not limit his consideration to the affairs of his own country, found something extremely praiseworthy in the then administration of the Celestial Empire. China, he says, which is without any acquaintance with France and its laws and customs, nevertheless surpasses that western realm in several aspects, a circumstance which taught him the wisdom of looking far beyond the confines of his native land and ascertaining the rules of conduct and law which prevail in other countries. In China Montaigne discovered there was this excellent administrative rule enjoined on the officers deputed to visit periodically the different provinces of the realm, that they should not only punish those who had been guilty of malversation in the charges committed to them, but should reward those who had not only carried out their duties but had been zealous in good work beyond what was expected of them. Misdeeds are always conspicuous; good work is more rarely visible to inspecting eyes and is not always rewarded as it deserves. In China, if Montaigne was not misinformed, it was otherwise, hence his commendation.—*L. T., 1933, p. 232.*

Judicial Greeting to New Silks.—The formal call within the Bar of newly-appointed King's Counsel, although giving pleasure to onlookers, especially to those related to the silks, rarely receives any additional interest so far as the Bench is concerned, beyond the naming each new K. C. in turn and requesting him, first to take his seat within the Bar, and then inquiring if he "moves." Lord Justice Scrutton has once or twice on recent occasions broken through this judicial taciturnity and extended to one of the group a greeting that has doubtless gladdened his heart. Some little time ago a King's Council, who, as a junior, had been almost exclusively briefed by the railway companies, was asked by the Lord Justice if he "or any of his numerous railway companies" moved. When the son of a former member of the Court of Appeal was called, Lord Justice Scrutton expressed his pleasure in greeting the new silk in the front row. In the case of another, he recalled that he himself was called within the Bar on the same day as the new silk's father. Last week, when Mr. Paley Scott was invited to take his seat within the Bar, the Lord Justice expressed his satisfaction in seeing Mr. Scott in the front row. Greetings such as these add something of a human and pleasurable interest to the ceremony which is gratifying.—*L. T., 1933, p. 232.*

New Wine in Old Bottles.—Time and again it has been made a reproach to lawyers that they use language in deeds remote from that of ordinary life and hard to be understood. There may be some truth in the indictment, but lawyers are by no means the sole transgressors in this matter. Business men, who are so apt to plume themselves on their businesslike methods, are not beyond criticism on the score of the awkwardness and unintelligibility of their documents. Sometimes, too, they are found putting new wine into old bottles, a proceeding condemned long ago. Only last week a case was heard in one of the Courts, the question turning on a policy of insurance taken out by contractors employed to lay some concrete flooring in a large factory in Birmingham, who desired to be indemnified against claims in the event of any of the work turning out to be defective. The contractors went to Lloyds and duly obtained a policy, but, will it be believed, it was on one of the ordinary marine forms which provided for the name of the ship being inserted, the name of the master, the destination and purpose of the voyage, and so on; all these clauses were retained, but to meet the particular risk typewritten clauses were inserted. Can one imagine a solicitor who has been instructed to draw a will doing so on printed form of a writ? And yet business men pride themselves on their superior practicality to members of the Legal Profession!—*L. T., 1933, p. 233.*

Law and Ethics.—Mr. Augustine Birrell tells a story that in the old days before the fusion of law and equity the disappointed suitor as he emerged from a Common Law Court might be heard to say, "Well, if this is law, give me equity"; while if purchance it was in a Chancery Court that he had suffered reverse, his language was, "If this is equity, give me law". He had his own ideal of justice to which as it seemed to him neither tribunal conformed. Lord Macmillan, who is not merely a distinguished Lawyer, but a keen student of moral philosophy, in a lecture recently delivered to the Associated Societies of the University of Edinburgh, on the subject of law and ethics, speaks of the contrast often drawn in popular parlance between law and justice, and he, too, conjures up the picture of an indignant citizen, smarting under a judicial decision, saying, "It may be law, but it is not justice". It may well be so, for, as the learned lord went on to remark, not infrequently judges have been heard saying that they regretfully found themselves compelled by the law to pronounce a particular decision which obviously offended their sense of fairness, and at the same time giving forth a hint that it was for the Legislature to intervene and redress the law's injustice. Lord Macnaghten once said, "It is a

public scandal when the law is forced to uphold a dishonest act." Happily, the occasions when this conclusion is forced upon the courts are not frequent, and in the main it is the case that law and ethics live together in unison. Lord Macmillan cites three comparatively recent cases in which, as he says, the courts have recognised, as against what some might regard as strict law, the moral virtue of altruism: *Wilkinson* v. *Kinneil Cannel & Coking Co.* (1897), 24 Rettie 1001; *Brandon* v. *Osborne, Garrett & Co.* [1924] 1 K. B. 548; and *Gregory* v. *Miller* (1933), *The Times* of 9th February. In concluding an admirable address, Lord Macmillan uttered these comforting words: "The surest hope of promoting the welfare of the individual and of the community lies in the wise co-operation of law and ethics."—*S. J., 1933, p. 205.*

Recorderships.—During the last few weeks, owing to death and other causes, there have been numerous changes in the personnel of the Recorders throughout the country. So long have we been accustomed to the name thus given to the judge of the city or borough quarter sessions that we rarely give a thought to the fact that his work is now somewhat remote from that which originally must have given him this title. In the quarter sessions he sits as the single judge; as the late F. W. Maitland said: "he is no amateur justice," for he must be a barrister of five years' standing; he is the recipient of a salary, not large, indeed, save in the larger cities, and he is appointed by the Home Secretary. In the City of London the Recorder holds a whole-time post, which involves the exercise of jurisdiction both in the Central Criminal Court and sometimes also in the Mayor's Court. Outside London the position of the Recorder struck a foreign observer as highly anomalous. As he pointed out, the Recorder might one day be sitting as judge in the quarter sessions court, and another day be present in the same town appearing as advocate before a High Court judge. That is true, but English law and administration are full of anomalies, and yet somehow justice is done and we all go on quite comfortably.—*S. J., 1933, p. 206.*

BOOK REVIEWS.

THE LAW AND PRACTICE OF LIFE ASSURANCE AND PROVIDENT INSURANCE IN INDIA, by Taradas Dutt, M.A., B.L., Advocate, Calcutta. Price Rs. 8.

It is with pleasure that we welcome this work on the above subject by Mr. Taradas Dutt of the Calcutta Bar on a subject of great importance but one in which there is a paucity of Indian legal text-books. There are well-known English text-books on the

subject but so far as we are aware there is none which considers the several points of difference in this branch of the law with reference to the peculiarities of the systems of law obtaining in this country. The learned author has in the course of his work relied largely upon the English decisions and the statements of leading English writers. Though the Indian decisions on the subject are few, he has referred to all of them in their proper places. Wherever there is a statute or any other law in India which renders any English rule inapplicable, the learned author has noticed the same. He has also incorporated the rules made by the Governor-General in Council and by the various Local Governments, excepting the Punjab, under the Indian Life Assurance Companies Act and the Provident Insurance Societies Act.

THE LAW OF PARTNERSHIP, by Gobind Ram Khanna, M.A., LL.B., Advocate, Lahore. Price Rs. 5.

In this commentary of the Indian Partnership Act, the learned author has given under the various sections of the Act an analytical and explanatory exposition of the Law of Partnership in British India. The principles of this branch of the law have been elucidated by illustrations which have been drawn both from the English and the Indian authorities. To facilitate a comparative study, the provisions of the English and the earlier Indian law have also been set out. The appendices give all the useful information on allied topics. Of these, Appendix A deals with the practice and procedure in suits relating to partnership. We believe that this book will be found useful to the members of the bench and the bar.

PRINCIPLES OF THE LAW OF PARTNERSHIP, by Manohar Lal Sachdeva, M.A., LL.B., Advocate, Lahore. Price Rs. 4.

This small book of less than 200 pages deals with the principles of the law of partnership in the form of chapters and not by way of commentary to the sections of the Indian Partnership Act. The headings of the chapters follow mostly those of the Act itself and the subjects are dealt with so as to be intelligible to even lay readers. Naturally, in a book of this description, all the decisions on the subject cannot be thrust in and the learned author has not attempted to do it. The leading decisions are given in their proper places. We trust that the book will be found useful to students and businessmen for whom it is mainly intended.

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NOTES OF INDIAN CASES.

HERAMBACHANDRA MAITRA *v.* JYOTISHCHANDRA SINGHA, I. L. R. 59 Cal. 501.

In this case, a purchaser's suit for specific performance was decreed but the plaintiff failed to deposit the purchase money into Court as provided in the decree and the defendant vendor applied to execute the decree and enforce the payment of the money by the plaintiff which was ordered by the learned Judges. This is the first case in this country, where the question of the position of the defendant in a suit for specific performance has been fully discussed after a review of the authorities and it has been held that a decree for specific performance enures for both the parties and that consequently each one of them is entitled to execute the decree as against the other with a view to fully carry out the agreement. This position seems to have been well recognised in England both in the leading text-books and in the forms of judgments. *See* Fry's Specific Performance, 6th edition, § 1171 *et seq.* and Halsbury's Laws of England, Vol. 27, p. 96, § 169, where it has been said that *either party* can avail himself of the reliefs after the judgment for specific performance.

Indeed, even when the action for specific performance at the instance of the vendor is dismissed for want of title, the defendant-purchaser is in the same action given a return of the deposit and the costs. *See* Seton on Judgments and Orders, pp. 2177 and 2187. *Cf.* also In re *S. S. Shirke*[1]. It must, however, be mentioned that in the decisions referred to by Sir Edward Fry and in Halsbury's Laws of England, i. e, *Morley* v. *Clavering*[2] and *Morgan* v. *Brisco*[3], the application was only made by the plaintiff and not by the defendant. The same view of the nature of decrees for specific performance has been taken by the Madras High Court in *Abdul Shaker Sahib* v.

1. (1931) 33 Bom. L. R. 1177. 2. (1861) 30 Beav. 108.
3. (1885) 31 Ch. D. 216.

Abdul Rahiman Sahib[1] where Sir Walter Schwabe, C. J., observed that after the original judgment for specific performance it is the definite practice in England that all consequential reliefs by reason of any party failing to comply with the terms of the judgment must be sought by application to the Court by which the judgment was passed. The whole question has been fully examined recently by the Madras High Court in C. R. P. No. 1112 of 1929 (not yet reported) where the learned Judges have followed the decision under notice. A short note of this case has appeared in 63 M.L.J. (Notes of Recent Cases), p. 47.

It must, however, be mentioned that it is not clear whether the decree in a suit for specific performance is of a preliminary nature or final and whether the enforcement of the rights of the parties is by an application in the suit which must be considered to be still pending or by execution of the decree treating it as final. The consideration of this question is somewhat difficult as the Civil Procedure Code has made no specific reference to this class of decrees and no form has been prescribed for the same. O. 21, R. 32 of the Code which provides for the enforcement of decrees for specific performance does not seem to throw much light on the question as it has only reference to the punitive procedure of contempt and not for the discharge or the satisfaction of the decree. See *Ahmadi Begam* v. *Amanat Husain*[2]. The rules of O. 20 and O. 34 of the first schedule of the Civil Procedure Code provide for preliminary decrees in some classes of cases of which specific performance is not one. In England, all such consequential reliefs are obtained in the action itself and not in execution and liberty to apply is ordinarily reserved in the original judgment. The Bombay High Court in *Bai Karimabibi* v. *Abderehman*[3] seems to take the view that the decree is final in its nature and the further remedy is in execution of the same and it has been held that the defendant also is a decree-holder within the meaning of S. 2 (3) of the Code. The learned Judges in the decision under notice are inclined to the same view. The Madras High Court in *Abdul Shaker Sahib* v. *Abdul Rahiman Sahib*[1] and in C. R. P. No. 1112 of 1929, referred to above, seem to take the view that the decree is preliminary in its nature and that further relief might be had in the suit itself. This uncertainty, it is submitted, can be set at rest by the High Courts making suitable rules under their rule-making power under the Code.

1. (1922) I. L. R. 46 Mad. 148: 44 M. L. J. 107.
2. (1904) 1 A. L. J. 431.
3. (1922) I. L. R. 46 Bom. 990.

THE BENARES BANK, LTD. *v.* HARI NARAIN. L. R. 59 I.A. 300: I. L. R. 54 All. 564: 63 M. L. J. 92 (P. C.).

In Hindu Law, business is regarded as heritable asset and such asset descending from an ancestor is a joint family asset and liabilities incurred in the carrying on of such a business would constitute a joint family liability for which family immoveable property can be alienated. This principle has no application to a trade business started for the first time by a manager or father, the propriety of which is to be tested by other considerations, and the Privy Council laid down in *Sanyasi Charan Mandal* v. *Krishnadhan Banerji*[1] that it was not within the competence of a family manager to start a new trade so as to make it a family trade with the necessary implications of such a trade, as to family liability. The case itself was a Dayabhaga case, but, as their Lordships point out in this case, the conclusion did not depend on anything peculiar to Dayabhaga and was therefore equally applicable to Mitakshara families. Some cases while recognising that that decision would govern the case of the ordinary manager held that the father's case stood on a different footing and that it would be open to him to start a new trade provided it was not a highly speculative one: *Rajagopal Pillai* v. *Veeraperumal Pillai*[2], *Venkatasami Naicker* v. *Palaniappa Chettiar*[3] and In the matter of *Radhakrishniah Chetty*[4]. In view of the decision in this case, that view would seem to be no longer sustainable. With that must also go the view that a trade might be treated as a family trade if the adult members consent to it expressly or impliedly: *Mahabir Prasad Misr* v. *Amla Prasad Rai*[5], *Tammi Reddi* v. *Gangi Reddi*[6], *Abdureheman Kutti Haji* v. *Hussain Kunhi Haji*[7] and *Lakshmiah* v. *The Official Assignee, Madras*[8]. It is not clear, however, whether the other distinction made in some of the cases between members of a caste or family whose profession or *kulachar* is trade and members of a non-trading family or caste is equally disapproved : *The Official Assignee of Madras* v. *Palaniappa Chetty*[9], In the matter of *Radhakrishniah Chetty*[4], *Mahabir Prasad Misr* v. *Amla Prasad Rai*[5],

1. (1922) L. R. 49 I. A. 108 : I. L. R. 49 Cal. 560 : 43 M. L. J. 41 (P. C.).
2. (1927) 53 M. L. J. 232. 3. (1928) I. L. R. 52 Mad. 227: 56 M.L.J. 380.
4. (1924) 19 L. W. 415. 5. (1924) I. L. R. 46 All. 364.
6. (1921) I. L. R. 45 Mad. 281 : 42 M. L. J. 570.
7. (1919) I. L. R. 42 Mad. 761 : 37 M. L. J. 316.
8. 1928 M. W. N. 576.
9. (1918) I. L. R. 41 Mad. 824 : 35 M. L. J. 473.

Damodaram Chetty v. *Bansilal Abeerchand*[1] and *Venkatasami Naicker* v. *Palaniappa Chettiar*[2]. The test according to these cases is whether having regard to the recognised business, profession, means of livelihood or what is called the *kulachara* of the family, the particular enterprise is only within the reasonable limits of the exercise thereof or really having regard to its nature, a speculative enterprise: *Damodaram Chetty* v. *Bansilal Abeerchand*[1] and *Raghunathji Tarachand* v. *The Bank of Bombay*[3]. Authority is found for the position in the text of Yajnavalkya "among herdsmen, vintners, divers, washermen and hunters, the husband shall pay the debt of his wife" because his livelihood depends upon her. "Stri" in the stanza is stated by Mr. Justice Chandavarkar to be taken in Balambhatti as an upalakshana for "manager of the family". The text itself would seem only to point to its being upalakshana for women of other classes such as Brahmans when they depend for their livelihood on their wives. Anyway, the authority of this text would only go so far as to justify the conclusion that "where a family carries on a business or profession and maintains itself by means of it, the member who manages it for the family has an implied authority to contract debts". Such a case might come within the definition of necessity as propounded by Vijnaneswara in verses 27 to 29, by which alone the question has, according to their Lordships, to be decided. The case must be one where the pursuit of the trade is "necessary for the support of the family". See *Babaji Mahadaji* v. *Krishnaji Devji*[4] cited in *Kameswara Sastri* v. *Veeracharlu*[5], *Mahesh Prasad* v. *Jagannath*[6] and *Inspector Singh* v. *Kharak Singh*[7]. Where it cannot be predicated that it is necessary "for the support of family" though the trade might be the profession of the caste it might not be justifiable. Their Lordships would seem to approve the view taken in *Inspector Singh* v. *Kharak Singh*[7] where reference is made to the verses in the Mitakshara, and the conclusion against the power of the manager to start a new trade is based upon them. In *Damodaram Chetty* v. *Bansilal Abeerchand*[1] it was held that the mere fact that the trade had stopped for some time during the grandfather's lifetime and was subsequently continued by the father, or that

1. (1925) I. L. R. 54 Mad. 711 at 719: 55 M. L. J. 471
2. (1928) I. L. R. 52 Mad. 227: 56 M. L. J. 380.
3. (1909) I. L. R. 34 Bom. 72 at 79. 4. (1878) I. L. R. 2 Bom. 666.
5. (1910) I. L. R. 34 Mad. 422 at 424 : 20 M. L. J. 855.
6. A. I. R. 1931 All. 743. 7. (1928) I. L. R. 50 All. 776.

there was variation in the kind of commodity sold, would not make it a new trade. Cf. *Subramanya Chetty* v. *Ramakrishnammal*[1]. Nor does the fact that a stranger partner retires from the business and accounts were taken for the purpose of settling his claims or that the name was changed make it a new business nor even the fact that subsequently speculative transactions were entered into: *Sri Thakur Ramkrishna Muraji* v. *Ratan Chand*[2]. The decision in this case applies only to alienations for debts contemporaneously incurred and not to alienations for antecedent debts. The pious obligation of the son extends to commercial debts incurred by the father though the trade is one started by him: *Achutharamaiya* v. *Ratnajee*[3], *Venkatasami Naicker* v. *Palaniappa Chettiar*[4], *Annabhat Shankarbhat* v. *Shivappa Dundappa*[5] and *Bal Rajaram Tukaram* v. *Maneklal Mansukhbhai*[6] and an alienation for such debts would bind the son. Nor would the decision exclude the application of the principle that a person cannot take the benefit of the trade accretions without bearing the burden. See *Subramanya Chetty* v. *Ramakrishnammal*[1], *Burrayya* v. *Ramayya*[7] and *Ganesa Iyer* v. *Amirthaswami Odayar*[8]. These cases, however, must not be taken to support the position that the carrying on of an ancestral trade, *e.g.*, the carrying on the father's trade which itself is not justifiable under the rule would in all circumstances be justifiable once the father is dead without reference to the nature of the business or the credit and debit side of the business

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CHANDUKCHAND *v.* VEDACHALA CHETTIAR, I. L. R. 55 Mad. 549 : 62 M. L. J. 180.

The somewhat wide and careless language of S. 73, cl. (2) of the Madras Hindu Religious Endowments Act (II of 1927) has given rise to contentions such as those that fell to be decided in *Vythilinga Pandara Sannadhi* v. *Temple Committee, Tinnevelly Circle*[9] and in this case. In the former, it was contended that a declaration as to the hereditary right of trusteeship was barred by this section. That question might

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1. 1924 M. W. N. 794.
2. (1931) L. R. 58 I. A. 173: I. L. R. 53 A. 190: 61 M. L. J. 665 (P. C.).
3. (1925) I. L. R. 49 Mad. 211 : 50 M. L. J. 208.
4. (1928) I. L. R. 52 M. 227: 56 M. L. J. 380.
5. (1928) I. L. R. 52 Bom. 376. 6. (1931) I.L.R. 56 Bom. 36.
7. (1923) I. L. R. 47 Mad. 449 : 46 M. L. J 49.
8. 1918 M. W. N. 892.
9. (1931) I. L. R. 54 Mad. 1001: 61 M. L. J. 815.

possibly get mixed up with the question of as to whether a temple is an excepted temple and might thus indirectly be capable of adjudication by the Board and ultimately by the Court by the machinery provided by the Act. But heaps of occasions might arise when the question of hereditary right of trusteeship might be wholly unconnected with that question, and thus be incapable of decision by the methods provided by the Act. It might arise independently of any questions such as those contemplated by Ss. 92 and 93, Civil Procedure Code. The adoption of the wide construction contended for would have barred suits in respect of the right without any other suitable machinery provided for their determination. The power of superintendence conferred by S. 19 of the Act could hardly be the substitute provided for the determination of such questions. The objections to the adoption of the wide construction contended for so as to include those cases appear in stronger relief in connection with the matter that arose for determination in the case under review. Here the suit was by a trustee to recover properties improperly alienated by previous trustee. To such a suit neither Ss. 92 and 93 of the Civil Procedure Code nor O. 1, R. 8 has been applied at any time. The Act itself does not provide any method for the recovery of the property unless S. 78 is read very widely so as to include such cases. Even so, cases where the trustee that alienated is still in office or where the trustee is a hereditary trustee would remain unprovided for. Suit by worshippers under O. 1, R. 8 would be swept away by S. 73 without leaving any other remedy available. There are two ways of avoiding the anomaly. One is to restrict the bar to suits that appropriately fall under S. 92 or 93 ; the other to read cl. (*i*) as covering all suits relating to temple administration whether they fall within S. 92 or not. The latter would involve the reading of the section in a manner opposed to the decision of the Privy Council in *Abdur Rahim* v. *Mahomed Barkat Ali*[1] and so far as one can see, does not involve any definite advantage over the old method of suit in ordinary Courts. For so long as S. 92, Civil Procedure Code, stands as at present, the suit under S. 92 cannot include a claim in respect of an unauthorised alienation and a separate suit would be necessary. One advantage there might be in such a course, *viz.*, all the suits relating to the administration of the temple will be in the same Court, the suit relating to scheme or accounts and the suit relating to alienations.

1. (1927) L. R. 55 I. A. 96 : I. L. R. 55 Cal. 519 : 54 M. L. J. 609 (P. C.).

BHAGAVATULLA KRISHNA RAO *v.* MUNGARA SANYASI, I. L. R. 55 Mad. 601 : 62 M. L. J. 313.

The estoppel of a tenant continues till he gives up possession to the landlord: *Bilas Kunwar* v. *Desraj Ranjit Singh*[1]. If he gives up possession to another that other is barred by the same estoppel even though that other is the true owner. *Pasupati* v. *Narayana*[2]. To both branches of the rule, eviction by title paramount seems to present an exception. For this purpose, it is not necessary that the tenant should actually go out of possession unless he claims to be entitled to possession in his own right ; it is sufficient if there is a threat of eviction and the tenant, in consequence of such a threat, attorns to the claimant, *see* Halsbury's *Laws of England*, Vol. 18, p. 480, but unless he comes to an arrangement with the person who has title he cannot set up such title. *See* Halsbury's *Laws of England*, Vol. 13, p. 404, *Mountnoy* v. *Collier*[3] and *Ram* v. *Pramatha*[4]. He must show a better title in a third person and also that he is defending on behalf of and with the authority of the third person. *Raja Bhawani Singh* v. *Maulvi Misbah-ud-din*[5]. On this principle, it would seem to follow that a mere decree for possession against the tenant would not amount to an eviction unless the decree is executed against him or on a threat of execution he attorns to the decree-holder. On the question as to in what circumstances a tenant without actually going out of possession can be said to be evicted by title paramount, there is considerable divergence of opinion. The question has arisen mainly with reference to Darkhast proceedings by Government. *Ammu* v. *Ramakishna Sastri*[6], *Ramakristna* v. *Subakka*[7], *Hattikudur Narain Rao* v. *Andar Sayad Abbas Sahib*[8] take one view. *Kunhunni Menon* v. *Sankaran Valia Raja*[9] takes in somewhat similar circumstances a different view. The former set of cases however would seem to be cases of really not eviction by adverse claimant but termination of title by the intervention of title paramount, *viz.*, Government as against the permissive occupants, the lessor and his lessee. See *Ammu* v. *Ramakishna Sastri*[6].

1. (1915) L. R. 42 I. A. 202: I.L.R 37 All. 557 : 29 M. L. J. 335 (P.C.).
2. (1889) I. L. R. 13 Mad. 335.
3. (1853) 1 E. & B 630.
4. (1921) 35 C. L. J. 146.
5. (1929) 56 M.L.J. 799 (P. C.).
6. (1879) I. L. R. 2 Mad. 226.
7. (1889) I. L. R. 12 Mad. 422.
8. (1914) 28 M. L. J. 44.
9. (1917) 24 M. L. T. 79.

The latter is really a case of adverse title. *Usman Koya* v. *Chidriamokkausa Akoth*[1] stresses the necessity for ouster. *Alaga Pillai* v. *Ramaswami Thevan*[2] is a case in which eviction was inferred from circumstances. In the case under review, there was an unexecuted decree for possession against the landlord and tenant. The question was whether the tenant could plead eviction by title paramount against the landlord seeking possession. It was rightly held that he could not for he had not gone out of possession or attorned to the decree-holder on threat of execution. It was argued in this case that the suit for ejectment itself operated as an ouster. That would have been right enough, for instance, if the decree had been for possession and mesne profits and had been executed and the question was as in *Ram* v. *Pramatha*[3] as to liability of the tenant for rent. The ouster in that case would have retroacted to the date of plaint so as to preclude the landlord from claiming rent for any period after the plaint. To give the plaint any higher value would have been to revive the technicalities of the English Law giving an artificial value to entry and assertion of claim which have been abolished by 3 & 4 William V, c. 27. Their Lordships further hold that the decision on the question of plaintiff's title was not binding as between the landlord and the tenant as they were co-defendants. This is open to question ; as it was the duty of the landlord to support his own title and secure the tenant's possession, a decree passed in his presence should certainly bind him. *Krishnan Nambiar* v. *Kannan*[4], *Muni Reddi* v. *Venkata Row*[5], *Thekkamannengath Raman* alias *Kochu Poduval* v. *Kakkasseri Pozhiyot Manakkal Karnavan*[6] which are unaffected by the decision of the Full Bench in *Secretary of State* v. *Syed Ahmad Badsha*[7]. Even so, the estoppel would have availed to the tenant only if he was evicted by the plaintiff or attorned to the plaintiff by reason of the judgment in the case.

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1. (1904) 15 M. L. J. 368. 2. (1925) 49 M L. J. 742.
3. (1921) 35 C. L. J 146. 4. (1897) I. L. R. 21 Mad. 8.
5. (1912) I. L. R 37 Mad. 238 at 250: 23 M. L. J. 447 (F. B.).
6. (1915) 28 M. L. J. 184.
7. (1921) I. L. R. 44 Mad 778 : 41 M L. J. 223 (F. B).

NARASIMHA RAO *v.* NARASIMHAM, I. L. R. 55 Mad. 577 : 62 M. L. J. 436.

This case illustrates the danger of the incautious translation of the concepts of one system of jurisprudence in terms of the concepts of another system. The idea of property in the English system of jurisprudence differs radically from the idea of Swamya of Vignaneswara. He splits up the English concept of property into Swamya and Swatantrya and treats each separately as having distinct legal consequences. A father has in respect of his self-acquired property both Swamya and Swatantrya, while the son has only Swamya and no Swatantrya. He also conceives of a higher Swamya like that of the son and lower Swamya like that of the wife. In respect of ancestral property the father has Swamya along with the son, and Swatantrya of a limited character. The legal consequence of the theory is that in the case of self-acquisition the son is bound to accept the father's disposition. On the death of the father, however, the impotent Swamya develops into Swamya with Swatantrya, but the Swamya was all along there. If a partition takes place between the father and the sons, the sons take a share in the ancestral property by right, in the self-acquired property at the option of the father but both kinds of property get released from the son's claims once there is a partition. If one of the sons alone divides himself, the rest remaining joint with the father, he has no further claims on the property of the father of either kind while the claims of the others remain intact. The sons take the self-acquisition of the father as Apratibandha Daya and not as Sapratibandha Daya when the sons are undivided from the father. The sons divided from the father will not take it as Apratibandha Daya their rights thereto by birth being extinguished. *Nana Tawker* v. *Ramachandra Tawker*[1] held that the undivided sons take the self-acquired property of the father by survivorship and the divided son being incapable of so taking is excluded. This way of putting it was quite right if "property" was understood in the Mitakshara sense of Swamya. It is quite wrong if property was conceived in the English sense. The son was not a joint owner in the English sense. The Full Bench in *Vairavan Chettiar* v. *Srinivasachariar*[2] had to consider the question

1. (1908) I. L. R. 32 Mad 377.
2. (1921) I. L. R. 44 Mad. 499; 40 M. L. J. 481 (F. B.).

whether a son claiming the self-acquisition of the father on the latter's death was claiming "the effects of a deceased person by succession" within the meaning of S. 4 of the Succession Certificate Act and it was held that he was. Property to the disposition of which in any manner the son could not object and to the enjoyment of which he could lay no sort of legal claim could not, according to the English jurisprudence, be regarded other than the effects of the father and the claim thereto after the death of the father, other than a claim by succession, however they might be regarded according to theories of the Hindu Law. The concept of Swamya of Vignaneswara is quite foreign to the English jurisprudence and the right of the son, during the father's lifetime, whatever its basis, could only be regarded as a *spes successionis* during the father's lifetime, just like the claim of a successor to an impartible zamindary.

PANYAM *v.* RAMALAKSHMAMMA, I. L. R. 55 Mad. 581: 62 M. L. J. 187.

It was believed at one time that there was a dominant theory in Hindu Law that property once vested cannot be divested. But it could not but be recognised early that the Mitakshara system of joint family presented a challenge to this theory—it being nothing but a process of continual divestment. But this was regarded as an exception to the general rule. It was accordingly held that the subsequently born children of a disqualified member of the family may take a share if the family continues undivided but if once there is a partition or the coparcenary is terminated by the death of the last efficient member there could be no further divestment. This view was not accepted in Madras in *Krishna* v. *Sami*[1]. As pointed out there the Mitakshara contemplates divestment even after partition, *e. g.*, when the father reserves no share to himself and a son is born subsequently to him. Subsequent adoption to a coparcener by a widow was considered to be an analogous case. Adoption is on all hands admitted to be an exception to the general rule but it was thought that the general rule could be relaxed only so far as to justify the divesting of the widow in the case of a separate owner and the members of the coparcenary

1. (1885) I. L. R. 9 Mad. 64 (F. B.).

in the case of a coparcenary so long as the coparcenary existed. If the coparcenary came to a natural termination by the death of the last owner or to an artificial termination by partition, adoption could not divest the estate of the holder and it was also thought that the natural consequence of such a view was that adoption in those circumstances was also bad. If Madras took a consistent view it should have held that the right of the adopted son was unaffected by such intermediate vesting. In *Adivi Suryaprakasa Rao* v. *Nidamarty Gangaraju*[1] divestment was taken as the test of the validity of the exercise of the power of adoption and the adoption was held invalid. Divestment as a test has become untenable in view of the decisions of the Privy Council in *Madana Mohana Deo* v. *Purushothama Deo*[2] and *Pratapsing Shivsing* v. *Agarsingji Raisingji*[3]. As pointed out in the case under review, even *S. V. P. Raghunada Deo* v. *S. B. K. Patta Deo*[4] is an authority to the contrary as it is the case of an impartible estate and not of a joint family estate. The objections to the theory on principle are: (*i*) it makes what is accessory, *viz.*, devolution of property the main thing, (*ii*) the test suggested is unavailable in the case of joint families to which another test becomes necessary, (*iii*) a man may leave his property to the widow or a stranger partially or wholly, to which case, the theory would obviously be inapplicable, (*iv*) a man may have both joint family property and self-acquired property which may follow different courses the widow having neither vested in her, *e. g.*, when he leaves a widow and a son by another wife on the latter dying unmarried. The joint family property would survive to the family, the self-acquired property would go to the uncles or other sapindas, anyhow the widow getting neither. To such a case if the test applicable to joint family property is applied, the adoption would be valid; if the other test is applied, it would be bad. (*v*) It has not yet been held nor can it on principle be so held that intermediate holders can prevent by alienating the properties the adoption taking place (cf. *Veeranna* v. *Sayamma*[5]). In *Madana Mohana Deo* v. *Purushothama Deo*[2] a theory of fulfilment of the religious purposes of adoption has been suggested as the true basis. On the

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1. (1909) I. L. R. 33 Mad. 228.
2. (1918) L. R. 45 I. A. 156: I. L. R. 41 Mad. 855; 35 M. L. J. 138 (P. C.).
3. (1918) L. R. 46 I. A. 97: I. L. R. 43 Bom. 778: 36 M. L. J. 511 (P.C.).
4. (1876) L. R. 3 I. A. 154: I. L. R. 1 Mad. 69 (P. C.).
5. (1928) I. L. R. 52 Mad. 398: 56 M. L. J. 401.

point as to whether attainment of ceremonial competency by the son for adoption is itself a termination of the authority there is a conflict in *Tripuramba* v. *Venkataratnam*[1] on one side and *Amarendra Mansingh Bhramarbar Rai* v. *Banamali Singh*[2], *Venkataramier* v. *Gopalan*[3], *Ananga Bhima Deo* v. *Kunja Bihari Deo*[4] on the other. The case under review holds following *Madana Mohana Deo* v. *Purushothama Deo*[5] (as reaffirmed in *Pratapsing Shivsing* v. *Agarsingji Raisingji*[6] and *Yadao* v. *Namdeo*[7]), that the fact that the property vested absolutely in some person other than the coparcenary is immaterial so long as the power is not exhausted and that the power is exhausted not by the property vesting in another but by the occurring of the contingency above referred to. The direct question was as to whether the power was terminated by the joint family property being partitioned by the members of the coparcenary and their Lordships hold that it is not. They leave open the question whether the power would not be at an end if the property descends by succession from the last coparcener to an heir of his by reason of the course of decisions to that effect (*see* on this point the latest decision of the Privy Council in *Bhimabai* v. *Gurunathgouda*[8]).

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1. (1922) I. L. R. 46 Mad. 423: 44 M. L. J. 349.
2. (1930) I. L. R. 10 Pat. 1.
3. (1918) 35 M. L. J. 698.
4. (1918) 25 M. L. T. 204.
5. (1918) L. R. 45 I. A. 156: I. L. R. 41 Mad. 855: 35 M. L. J. 138 (P. C.).
6. (1918) L. R. 46 I. A. 97: I. L. R. 43 Bom. 778: 36 M. L. J. 511 (P. C.).
7. (1921) L. R. 48 I. A. 513: I. L. R. 49 Cal. 1: 42 M. L. J. 219 (P. C.)
8. (1932) 64 M. L. J. 34 (P. C.).

NATHUNI THAKUR *v.* RAMSARAN SINGH, I. L. R. 11 Pat. 654 (S. B.).

This is an important pronouncement of the Special Bench dealing with the principles on which an enhancement of rent should be regulated under the sections of the Bengal Tenancy Act. The precise question that was raised for decision was whether in a suit for enhancement under S. 30 (*b*) of the Act the tribunal is entitled to take into consideration the great economic depression with reduction in staple food-crop prices which has taken place recently. The Full Bench held that under S. 35 of the Act the Court is bound to take the same into consideration and give effect to it even to the extent of denying any enhancement if as a result of the same, considered together with the proposed enhancement, there would be a disturbance of the proportion of the produce allotted to the landlord and the tenant respectively, measured in money value up to the time of suit. The Court is entitled to take judicial notice of the great economic convulsion and can ascertain its effect and extent from documents of public record and consider it along with the actual evidence that may be let in by a tenant as affecting his own particular case. The governing section of this whole group of sections is S. 35 and the expression "unfair and inequitable" therein is intended to refer to the maintenance of the proportion of the fixed produce between the landlord and tenant which is the basis of the rent paid by a raiyat to the landlord under the Indian system of landholding. The calculation of reasonable enhancement under the procedure laid in S. 32 of the Act may have to be corrected by the discretion to be exercised under S. 35, the main purpose to be kept in view being the maintenance of the proportion of the produce to be allotted to the parties. A further qualification may also be imported to the effect that the nett result should not be to reduce the raiyat's income calculated in terms of money to such an extent as to involve serious hardship. The above principles are stated in a forceful judgment by the Chief Justice with which the other four Judges agree. The analogous provisions of the Madras Estates Land Act are also to be interpreted in the same manner. More especially so as S. 35 of the Madras Act itself says that the rent cannot be enhanced so as to raise it beyond the value of the established waram of the village. The value of the judgment lies not so much in its applicability to the matters which

are governed by the Act in question or other similar Acts but because the principles stated are applicable even to enhancements and remissions of land revenue collected by the executive departments of the Government from ryotwari areas as in this presidency. The learned Chief Justice puts it in his judgment as follows: " The recent great and sudden economic change in the value, in terms of money, of foodstuffs is a notorious fact. A Court which declined to take judicial notice of it would, I imagine, serenely ignore an earthquake. Its effect in any particular case might be such as to render an enhancement (otherwise justifiable in the sense that the correct proportions are restored) unfair and inequitable because the money value of the proportion left to the raiyat might be so low as to involve serious hardship." These observations lose none of their force, when similar questions arise as between the Government and the landowners as regards land revenue payable to the Government, even where the incidence of it is not regulated by any Act of the Legislature.

KING-EMPEROR *v.* RAFI MIAN, I. L. R. 11 Pat. 669.

This judgment differs statedly from the view that has found favour with the Allahabad and Madras High Courts as regards the extent and scope of the High Court's powers and duty in a reference under S. 307 of the Code of Criminal Procedure. The Full Bench decision of the Madras High Court in In re *Veerappa Goundan*[1] holds that the verdict of the jury should be allowed to stand unless the High Court could hold that "the verdict is such that no reasonable man could have come to" or as it is otherwise expressed in other decisions that the verdict is manifestly perverse and unreasonable. The view of an earlier Division Bench that the High Court had a freer hand than even a Court of appeal in such cases and that the High Court should deal with it as if the case came before it in the capacity of a trying Judge, was definitely overruled. The preponderance of view in the Bombay and Calcutta Courts is in favour of the view that has been laid down by the Madras Full Bench. It has however been pointed out in a subsequent Madras decision, *Mottaya Pillai*, In re[2], by a bench that the Full Bench view may prevent a scrutiny even of misdirec-

1. (1928) I. L. R. 51 Mad. 956: 55 M. L. J. 591 (F. B.).
2. (1928) 56 M. L. J. 103.

tions in the charge to the jury unless the High Court can first hold that the verdict on the evidence is unreasonable and to that extent a reference by a Sessions Judge may prejudice an accused who would have been in better position if that Sessions Judge had convicted and the accused had appealed therefrom.

We do not think that the Full Bench intended to lay down anything more than that the verdict of the jury should not be set aside merely on the ground that the High Court should come to a different conclusion on the evidence as opposed to the alternate view that the verdict should be shown to be "perverse and manifestly unreasonable". If there are other grounds of illegality vitiating the verdict or the trial, the Full Bench decision does not preclude the High Court from doing justice or passing final orders as the circumstances require. The only question with which the Full Bench was concerned was the extent of interference where the attack on the verdict was based on the wrong appreciation of the evidence in the case.

The judgment under notice however proceeds on a literal reading of the words of S. 307 and the learned Judges hold that the High Court in dealing with references under S. 307 are not trammelled by the principles underlying S. 418 and S. 423 (2) of the Code dealing with criminal appeals. The distinction between the English jury system and the Indian jury system which is relied on, though true, does not really conclude the point nor is there any justification for the criticism that the previous decisions of the various High Courts did not appreciate the amplitude of the language of the Code. The Code uses the words "give due weight" and does not in that section give any further guidance The Courts have to gather the principles from the rest of the Code and the expression "due" is best understood in the light of the importance attached to a jury's verdict as provided for in other parts of the Code.

MEHR CHAND *v.* MILKHI RAM, I. L. R. 13 Lah. 618 (F. B.).

An auction-purchaser in execution of a money decree whose sale was confirmed and ~~who~~ was put into possession was subsequently dispossessed under a decree in a suit by a third person who had a paramount title. The judgment-debtor was found to have no saleable interest that could pass to the auction-purchaser. The Full Bench hold that in such circumstances the auction-purchaser could recover the moneys paid by him from the original decree-holder by a suit against him. The cause

of action is rested on the basis of "money had and received" as on a total failure of consideration. This view is opposed to the general trend of decisions in the other High Courts which hold that under the Code of 1908, the only right of the auction-purchaser is by an application under O. 21, R. 93 and that where this is not available, even the total absence of a saleable interest in the properties does not give a cause of action to the auction-purchaser. Under the Code of 1882, the Courts were holding that the law provided a remedy. It has been taken away under the new Code. The rule of "caveat emptor" is said to operate so as to deny any right to relief in such cases. If there were any fraud or such other conduct on the part of the decree-holder as would in law make it obligatory on him to refund the money it would be another matter but in the absence of such circumstances the mere discovery subsequently of a total want of saleable interest does not *per se* confer a right to obtain a refund of the auction amount. The decision under notice however specifically dissents from the above view and the learned Judges hold that there is nothing in O. 21, R. 93 which takes away any other right existing under the general law and that even S. 315 of the old Code of 1882 did not create a new right. According to this Full Bench, there is always a representation by the decree-holder and by the Court acting as his agent, that there is some kind of saleable interest in the properties although it is said there is no guarantee of its extent. It is difficult to hold that there is a warranty of title in Court sales to any extent. It is one thing to say that that there is a representation but this is quite different from a warranty.

JNANADASUNDARI SHAHA *v.* MADHABCHANDRA MALA, I. L. R. 59 Cal. 388.

In this case, the learned Judges have held that the rejection of a memorandum of appeal on the ground that the proper court-fee has not been paid on it and that the order of the Court calling for the additional court-fee has not been complied with is not a decree but only an order. It must be pointed out that the decision on this point is only *obiter*, as the learned Judges have proceeded on the view that under O. 7, R. 13 read with section 107, a new memorandum of appeal can be and was filed in the case under notice.

On the question whether the rejection of a memorandum of appeal stands on the same footing as the rejection of a plaint under O. 7, R. 11 read with section 2 (2) which expressly enacts the latter to be a decree within the meaning of the Code, the authorities of all the High Courts are uniform to the effect that it amounts to a decree. Reference may be made in this connection to the decisions in *Gulab Rai* v. *Mangli Lal*[1], *Rup Singh* v. *Mukhraj Singh*[2], *Raghunath Gopal* v. *Nilu Nathan*[3], *Gunga Dass Dey* v. *Ramjoy Dey*[4], *Rakhal Chandra Ghosh* v. *Ashutosh Ghosh*[5], *Ayyanna* v. *Nagabhooshanam*[6], *Zamindar of Tuni* v. *Bennayya*[7], *Surajpal Pandey* v. *Utim Pandey*[8] and *Gabba* v. *Kanchhadi Lal*[9]. In this connection, it is impossible to draw any distinction between the various sub-rules of O. 7, R. 11 in deciding whether a particular order amounts to a decree or not. It must also be noticed that the decisions in *Rakhal Chandra Ghosh* v. *Ashutosh Ghosh*[5], *Surajpal Pandey* v. *Utim Pandey*[8] and *Gabba* v. *Kanchhadi Lal*[9] are decisions under the Code of 1908 unlike the others which were given under the Code of 1882. The provisions of the new Code on this point have not made any substantial change from the old Code. Even as early as 1903, in *Saminatha Aiyar* v. *Venkatasubba Aiyar*[10], two learned Judges of the Madras High Court thought that the question was no longer one of first impression but covered by a series of decisions of the various High Courts, though they themselves were disposed to take a different view if they had to consider the point apart from authority. We venture to submit that in 1931 when the decision under notice was given, the question which is one of procedure should have been governed by the rule of *stare decisis* under the uniform current of decisions referred to above.

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1. (1884) I. L. R. 7 A. 42.
2. (1885) I. L. R. 7 A. 887.
3. (1885) I. L. R. 9 Bom. 452.
4. (1885) I. L. R. 12 C. 30.
5. (1913) 17 C. W. N. 807.
6. (1892) I. L. R. 16 M. 285.
7. (1898) I. L. R. 22 M. 155: 8 M. L. J. 304.
8. (1921) 6 Pat. L. J. 625.
9. A. I. R. 1922 Nag. 62.
10. (1903) 13 M. L. J. 300.

H. V. LOW & CO., LTD. *v.* JYOTIPRASAD SINGH DEO, I. L. R. 59 Cal. 699 : 61 M. L. J. 699 (P. C.).

In this case, the plaintiffs had agreed to take a lease of mining rights in certain properties in a Zamindary and paid a premium under the agreement and there was a clause in the agreement that if the plaintiffs should neglect or fail to take the lease within a certain time, except for the reason of the want of the lessor's title to the properties, they should forfeit the premium paid to the Zamindar who was the defendant in the case. The plaintiffs' solicitors called on the defendant's manager to produce some documents of title, to show that certain grants made by the defendant's predecessors to third persons did not confer mining rights on the grantees; but the Zamindar could not produce the same. The plaintiffs consequently claimed to recover the premium paid. Their Lordships held, affirming the decision of the Calcutta High Court on the appellate side, that the plaintiffs had not shown a reasonable doubt as to the defendant's title and were therefore not entitled to recover the premium paid.

It is necessary to notice that, in this case, their Lordships have drawn a distinction in this respect between an agreement to sell and an agreement to lease based on the difference of the language in section 55, sub-section 1 (*a*) and (*b*) and section 55, sub-section (2) as contrasted with section 108-A (*b*) and (*c*) of the Transfer of Property Act and held that in the case of an agreement to lease there is no right in the proposed lessee to call for the production of documents of title from the lessor and that there is also no implied covenant as to the title in favour of the lessee available as against the lessor. In both these respects, as regards the case of vendors and vendees, the rights are clearly laid down in section 55, sub-section 1 (*a*) and (*b*) and sub-section (2); and the vendee has the right to call for the documents of title from the vendor and there is a covenant as to title to the property in the vendor and available to the vendee which also runs with the land. These questions are fully discussed by the Calcutta High Court in *Jyotiprasad Singh Deo* v. *H. V. Low & Co.*[1] with reference to the English law and the language of the sections of the Transfer of Property Act. Their Lordships' decision has the effect of upholding the view taken by the High Court in that case from which this appeal was taken to them.

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1. (1929) I. L. R. 57 Cal. 1189.

SIRAJ FATMA *v.* MAHMUD ALI, I. L. R. 54 All. 646 (F. B.).

The question in this case was as to whether a judgment is liable to be re-opened at the instance of a minor on his attaining majority on the ground that his guardian or his next friend was guilty of gross negligence in the conduct of the case. The precise facts would seem to raise a further question to which sufficient attention does not seem to have been paid, *viz.*, that assuming that a judgment is liable to be re-opened on that ground, whether that rule applied to the facts of the case. Those facts were:—In a partition proceeding before the Revenue Court, the guardian of the minor raised the appropriate defence, the result of which was he was asked to go to the Civil Court and have the question of title decided. The guardian did not do that and in that he was guilty of gross negligence. The Revenue Court proceeded to partition after the expiry of the time allowed. It was thus the failure to institute the suit that constituted the negligence on the part of the guardian and not anything done or omitted to be done in the course of the suit. Failure to appeal might afford a parallel. Failure to institute a suit to set aside an adverse order on a claim might have afforded another but for the fact that minority is an exemption under the Limitation Act. For aught one knows, it might be that the guardian had not the necessary funds or the *de jure* guardian did not supply the necessary funds (as it might well be that the guardian *ad litem* is not the guardian of the minor). It might be urged that that complication would only affect the finding of gross negligence and the conclusion arrived at is on the footing that there was gross negligence on the part of the guardian. In the case of ordinary appeals, the Limitation Act provides a remedy under S. 5. It is difficult to see how the judgment of the first Court can be impeached on the ground that the guardian did not file the appeal. The Lower Court had brought what light it was capable of to the decision of the question and that decision can in no sense be said to be affected by the negligence. Unless the peculiar division of functions between the Civil and Revenue Courts in the decision of not only suits but also questions arising in a suit that obtains in that part of the country is held to justify the looking upon the suit and the revenue proceedings, as a part of the same proceeding, in other words unless the failure of the guardian to file the

suit is assimilated to the failure to summon witnesses or to take other subordinate proceedings in a suit, it is difficult to justify the application of the rule to the facts of the case. It is quite another question whether there is a general principle that minority should extend the period of limitation in all cases, even apart from the special provisions of the Limitation Act. On that question there is some difference of opinion but the general trend of opinion is that there is no such general principle.

On the point discussed in the case, there is a cleavage of opinion, not that there is no remedy at all but some decisions hold that the only remedy is review so far as it goes, while others hold that review is not an adequate remedy and the remedy of a suit is available. The Judges that take the former view rely on S. 11 of the Civil Procedure Code and S. 44, Evidence Act, which show according to them that the only defences open to a person properly a party to a suit is fraud and collusion. But the whole question turns on as to when a minor can be said to be properly represented. Non-appointment of a guardian and improper appointment of a guardian, *e. g.*, of a person with adverse interest or one that is disqualified in law from acting as a guardian *ad litem* have been held to be cases of a non-representation and the minor in those circumstances is not barred by the proceeding. Grossly inefficient representation by the guardian appointed is though not fraud in the common law sense of the term, is fraud in the equity sense of it like undue influence, or failure of duty on the part of solicitor or other persons in fiduciary relationship owing a duty to the person concerned: *Nocton* v. *Lord Ashburton*[1], but apart from that, it is really a case of non-representation for representation in the case of minors means reasonably efficient representation and not mere representation on paper. . Failure on the part of the guardian to present certain points of view by reason of negligence on his part might be a ground for review even in the narrow sense in which "sufficient reason" has been understood but there may be other kinds of negligence than presentation of the proper view-point which may not come within the section as to review and the remedy is also conditioned by the *personnel* of the Court and a rule of limitation which no doubt is flexible by reason of S. 5

1. (1914) A. C. 932.

of the Limitation Act but even so, is much dependent on the discretion of the Court. In addition, in this particular case, review did not form part of the Revenue Court procedure. The large bulk of authority in India is in favour of the remedy of suit and we think, that both in view of the requirements of the case and on principle, that is the proper view to take.

NAWAL KISHORE *v.* SARJU RAM SAHU, I. L. R. 54 All. 774.

Having regard to the language of S. 55, Transfer of Property Act, cases in India have held that mere notice of defect in title is not sufficient to exclude the covenant for title. There must be an express "contract to the contrary": *Adikesavan Naidu* v. *Gurunatha Chetti*[1], *Arunachala Aiyar* v. *Ramaswamy Aiyar*[2], *Subbaroya* v. *Rajagopala*[3], *Thekkamannengath Raman* v. *Kakkasseri Pashiyot Manakkal Karnavan*[4] and *Vellayappa Rowthen* v. *Bava Rowthen*[5]. In connection with the vendor's lien the Privy Council had occasion to consider the significance of the expression "contract to the contrary" in *Webb* v. *Macpherson*[6] and their Lordships say "you have to find something, either express contract or at least something from which it is a necessary implication that such a contract exists" to exclude the statutory charge. In *Ganesh Lal* v. *Charan Singh*[7] their Lordships had to consider the effect of those words in S. 82 of the Transfer of Property Act. Their Lordships insist upon a special contract to exclude the benefit of the section. It is impossible to infer from mere knowledge of defect of title that the purchaser stipulates against the statutory assurance; for aught one knows, he might expect the vendor to further assure the title if an occasion arises for it, the transfer being only voidable at the instance of the other members.

AZIZ ULLAH KHAN *v.* COLLECTOR OF SHAHJAHANPUR, I. L. R. 54 All. 801.

This case lays down that the Court's powers of amendment are not restricted to errors that have crept in the judg-

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1. (1916) I. L. R. 40 Mad. 338: 32 M. L. J. 180 (F. B.).
2. (1914) 27 M. L. J. 517.
3. (1914) I. L. R. 38 Mad. 887.
4. (1915) 28 M. L. J. 184.
5. (1915) 29 I. C. 747.
6. (1903) L. R. 30 I. A. 238: I. L. R. 31 Cal. 5 : 13 M. L. J. 389 (P.C.).
7. (1929) L. R. 57 I. A. 189: I. L. R. 52 All. 358: 59 M. L. J. 177 (P.C.).

ment or decree but extend to errors that have crept in plaint, decree, sale certificate and Dakhalnamah: *Somasundaram Chettiar* v. *Rama Krishna Kakir Velasami*[1] and *Narayanasami* v. *Natesa*[2]. A recent case in Madras, *Latchayya* v. *Seethamma*[3], would seem to recognise the power of the Court to amend a decree as consequential upon the rectification of the mortgage forming the basis of the decree provided, of course, the third parties' rights have not intervened or the principle of *Marriot* v. *Hampton*[4] does not prohibit it. This is in principle to go back to a period antecedent to the plaint but it is only in one sense so. The error is in the decree—the inducing cause of the error being the error in the document. The subsequent rectification does not rectify the contract but only the expression of it so that the thing that justifies the amendment is a thing that existed at the date of the plaint as well as since though ascertained at a later date.

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1. (1914) 22 I. C. 774.
2. (1892) I. L. R. 16 Mad. 424.
3. (1931) 62 M. L. J. 350.
4. (1797) 7 T.R. 269: 101 E.R. 969.

NAGENDRANATH DE *v.* SURESH CHANDRA DE, L. R. 59 I. A. 283: I. L. R. 60 Cal. 1 : 63 M. L. J. 329 (P. C.).

The late Mr. Mitra in the opening of his commentary to clause (2) of Art. 179 of the Limitation Act of 1877, which corresponds to clause (2) of Art. 182 of the present Limitation Act, observed that the meaning of the words "where there has been an appeal" in the clause has been the subject of several inconsistent decisions and the learned editors of the latest edition of the work have seen no reason to alter it as the conflict has only become more accentuated in the course of years. This decision of their Lordships being the pronouncement of the highest tribunal has set at rest much of the conflict on the point and rendered reference to the older decisions useless. Indeed, their Lordships say, in so many words, that nothing would be gained by discussing those varying authorities in detail and proceed to give effect to the plain words of the statute, sweeping away all the artificial distinctions that have been imported into the matter without any warrant.

After this pronouncement, once there has been an appeal presented against a decision, the circumstance that the appeal is incompetent or that all or any of the parties to the execution are not made parties to the appeal or that the proper Court-fee has not been paid on the memorandum of appeal or that the decree is only from a part of the decree or that it does not imperil the portion of the decree sought to be executed, is immaterial and time will nevertheless run for the purpose of execution from the date of the final decree or order of the appellate Court. This gives full effect to the language of the article of the Limitation Act and is in accord with the decision of the Full Bench of the Madras High Court in *Kristnama Chariar* v. *Mangammal*[1] if reference to it is permissible.

A reference to the facts of the case under notice may be made to clear up the limits of the decision. There were several co-mortgagees who had obtained a preliminary decree on the mortgage ; and some of the co-mortgagees claimed to have acquired the rights of some others also and applied for a final decree including their rights as well. A judgment was given which gave the decree-holders rights only in respect of their own original shares but denied the right by assignment of the

1. (1902) I. L. R. 26 Mad. 91 (F. B.).

shares of the others. The final decree pursuant to this was not drawn up till some time later. An appeal was filed after the decree was drawn up against the decision by the applicants for final decree styling it as an appeal against an order apparently to save Court-fees on the allegation that no decree had been drawn up, against the co-mortgagee decree-holders alone claiming right to their shares also but not making the judgment-debtors parties to the appeal. This appeal was apparently dismissed among other grounds for the reason that the appeal should properly have been against the decree and not merely against the order as it was styled. Subsequently the other mortgagee decree-holders whose shares were claimed by assignment sought to execute the decree against the judgment-debtors who were not made parties to the appeal and their Lordships held that time for execution ran from the appellate Court's decision. It may be noticed that, on these facts, there was no appeal against the final decree which was sought to be executed but only what purported to be on appeal against an order of the first Court prior to the drawing up of the decree. But their Lordships have apparently treated it as in substance against the decree itself which was sought to be executed. Otherwise the class of cases dealing with the question whether the appeal contemplated by clause (2) should be only against the decree or order sought to be executed or not, would have come up for review. On this question again there is conflict among the decisions in India. Cf. *Somar Singh* v. *Deonandan Prasad Singh*[1] and *Narsingh Sewak Singh* v. *Madho Das*[2] on the one hand and *Ahammad Kutty* v. *Kottakkat Kuttu*[3] and *Fakir Chand Mandal* v. *Daiba Charan Parnit*[4] on the other.

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1. (1927) I. L. R. 6 Pat. 780.
2. (1882) I. L. R. 4 All. 274.
3. (1932) 64 M. L. J. 251.
4. (1927) I. L. R. 54 Cal. 1052.

HANSRAJ GUPTA *v.* ASTHANA, I. L. R. 54 All. 827: 63 M. L. J. 859 (P. C.).

In this case, their Lordships carry the principle that S. 156 of the Companies Act creates a statutory liability, a liability *ex lege* as distinguished from liability *ex contractu* under the contract for allotment or purchase of shares, to its logical conclusion and hold that if a man's name is on the register of shareholders with his knowledge and consent during the period contemplated by that section, his liability is absolute though he may be able to show that the contract is void or illegal. It would be otherwise if his name was without his consent, as for instance, if there was mistake as to the identity of the company, *International Societies of Auctioneers and Valuers*, In re[1], or there was no concluded contract at all, *Scottish Petroleum Co.*, In re[2]. If the contract is only voidable, if he commences proceedings before the commencement of the winding up, he is protected, not otherwise. Their Lordships hold in this case that the mere fact that the contract is void as contravening S. 105 of the Companies Act is not sufficient to protect if the name was placed with his knowledge and consent. Some other questions arose in the case—one under S. 105 of the Companies Act and the other as to when limitation commences for an application to rectify the list of contributories. On the latter point the Allahabad High Court had held that though the notice after the list of contributories was finally prepared was not served and according to the rules such notice was the starting point, the fact that the party appeared before the list was finally prepared and had knowledge of such preparation made a difference. Their Lordships were not prepared to accept that conclusion. Their Lordships were also not prepared to accept the position that an agreement to give a person taking large shares, option to give credit to the balance of share amount in the price of goods to be ordered from him on certain advantageous terms contravened S. 105 of the Companies Act.

JAI DALAL MADAN GOPAL, *In the matter of*, I.L.R. 54 All. 846.

In this case, following certain other judgments of the Calcutta and the Allahabad High Courts, their Lordships hold

1. (1898) 1 Ch. 110. 2. (1882) 23 Ch. D. 413.

that a partnership as such cannot be a member of another partnership though Sir Sulaiman, C. J., was personally inclined to take a different view. These cases do not seem, however, to have taken note of the judgment of the Privy Council in *Sathappa Chetti* v. *Subramanian Chetti*[1], where the very point arose for consideration and the Privy Council affirmed the judgment of the High Court holding that there could be a "superior partnership of which an individual was one side and the whole firm as a unit was the other side" and in that view their Lordships hold that in an internal suit between the members of the unit which formed the partnership with him, the other was not a necessary party. A different view has been taken in connection with the Companies Act by the Privy Council in *The Firm of Senaji Kapurchand* v. *The Firm of Pannaji Devichand*[2], upholding the view of the Madras High Court in *The Firm of Pannaji Devichand* v. *The Firm of Senaji Kapurchand*[3]. The Contract Act and the Companies Act do not seem to be *pari materia*. While it must be inconsistent with the object of S. 4 of that Act to admit association of persons as units there is no such inconsistency with the object of the Indian Contract or the Patnership Act. The implication of an association being admitted as a partner would be that the representatives of the association would be entitled to function in the partnership as partner.

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1. (1927) 53 M. L. J. 245 (P. C.). 2. (1930) 59 M. L. J. 435 (P. C.).
3. (1926) I. L. R. 50 Mad. 175; 51 M. L. J. 667.

RASUL BAKHSH *v.* MST. BHOLAN AND OTHERS, I. L. R. 13 Lah. 780.

This is an interesting decision. The Privy Council held in *Rashid Ahmad* v. *Musammat Anisa Khatun*[1] that an oral pronouncement by a Sunni Mahomedan of the Hanafi sect of the relevant words operates as a valid and effective divorce even though there was a mental observation that it should not be a genuine divorce. The judgment under notice, however, distinguishes that case on the ground that the Mahomedan Law relating to the effectiveness of a written divorce is different. The Mahomedan Jurists distinguish between 'customary' writing and 'unusual' writing and also between writing which is 'manifest' and which is 'not manifest'. Where the document is not written and superscribed in the usual form the absence of an intention to divorce will prevent the document from having effect. On the facts it was found that the husband had no intention to effect a divorce and it was accordingly held that the marriage relationship did not validly terminate.

JHANDA SINGH *v.* GULAB MAL-BHAGAWAN DAS, I. L. R. 13 Lah. 788.

A suit for a declaration that a decree is not binding on the plaintiff and for an injunction restraining the defendant from executing it will come under S. 7, cl. (*iv*) (*c*) of the Court-Fees Act. In such cases the preponderating view is that the plaintiff is entitled to put his own valuation which the Court is not entitled to object to and *ad valorem* court-fee is payable thereon. In Madras the amending Act V of 1922 has changed the law. In the absence of any such provision, the Lahore Court has held that the plaintiff's valuation though arbitrary is final and the value for purposes of jurisdiction also is the same.

DEBI PRASAD PANDEY *v.* GAUDHAM RAI, I. L. R. 11 Pat. 772.

After the amendment of S. 98, Civil Procedure Code, by Act XVIII of 1928, the relevant provisions of the Letters Patent alone govern the procedure when there is a difference of opinion between two or more Judges of a Chartered High Court even when the appeal is one from a Subordinate Court under the Civil Procedure Code. It is only if the Letters Patent do not contain any provisions regulating the procedure or when there are no Letters Patent as in the case of non-chartered High

1. (1931) L. R. 59 I. A. 21: I. L. R. 54 A. 46: 62 M. L. J. 405 (P.C.).

Courts that S. 98, Civil Procedure Code, will apply. The conflict that prevailed among the High Courts prior to the amending Act is expressly set at rest by the intervention of the Legislature. A Full Bench of the Madras High Court had exhaustively considered the matter. See *Dhanaraju* v. *Balakissendas Motilal*[1]. The Patna Court also agrees with this view and has expressly followed the Madras Full Bench.

SITAL PRASAD SHUKUL *v.* BABU LAL SHUKUL, I. L. R. 11 Pat. 785.

An application for transfer of a decree to another Court for execution is a step-in-aid of execution under Art. 182, cl. (5) of the Limitation Act, but it must be "in accordance with law" to save limitation. The Patna Court has held in the above case that an application to transfer a Sub-Court decree to the District Munsiff's Court for execution is of no avail as under the rulings of that Court the Munsiff is not competent to execute the decree. The Madras Court has always held that in such circumstances there is jurisdiction in the Munsiff's Court but the other Courts take a different view. The fact that no comment on such procedure was made by the Privy Council in *Maharajah of Bobbili* v. *Sri Raja Narasaraju*[2] is perhaps significant, as the view that the transfer is invalid may well sustain the legality of the application to the District Court as a proper application to the proper Court.

BASHIST NARAIN SAHI *v.* SIA RAMCHANDRA SAHI, I. L. R. 12 Pat. 18.

The learned Judges had not at the time of their decision the benefit of the exposition by the Judicial Committee of the true scope and meaning of S. 124 of the Indian Succession Act in their recent decision in *Indira Rani Ghose* v. *Akhoy Kumar Ghose*[3]. Adopting the principle of that decision, the death of the legatee without issue refers, in the circumstances, to the contingency of his leaving no issue, he having first taken the properties under the will. So interpreted, there is a valid gift over to the deities under the terms of the will. As explained by the Privy Council, S. 124 cannot apply where a period is specified in the will itself as the period within which the contingency is to happen. The decision would have been the other way if the Privy Council decision is applied properly.

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1. (1929) I. L. R. 52 Mad. 563: 57 M. L. J. 264 (F. B.).
2. (1916) L. R. 43 I. A. 238: I. L. R. 39 Mad. 640: 31 M. L. J. 300 (P. C.).
3. (1932) 64 M. L. J. 48 (P. C.).

SHANMUGASUNDARA MUDALIAR *v.* RATNAVELU MUDALIAR, I. L. R. 55 Mad. 1025: 63 M. L. J. 383.

The principle on which restitution in the case of reversal of decrees proceeds is, according to Lord Cairns in *Rodger* v. *The Comptoir d'Escompte de Paris*[1], the well-recognised principle that the act of Court should not be allowed to injure anybody and if that is the right principle (though no doubt the wrongful gain made by the other side cannot be altogether ignored), the true question is the extent of the injury caused by the Court's act and the party injured would be entitled to compensation therefor though it may be the other side is not proportionately benefited. In this case, the money under decree had been deposited but the other side could not take it away as he was unable to furnish security as directed by the appellate Court. Nevertheless, their Lordships held that the other side was bound to pay interest. Acting on this principle the Court allowed interest for the whole period money was lying in Court in *Dalu Ram* v. *Ramanand*[2], and in some other cases, acting on the same principle the Court has allowed a higher rate of interest than the Court rate. The fact that the inconvenience was invited by the judgment-debtor by an application for stay did not, according to their Lordships, make any difference. The decree-holder not having disclaimed intention to execute and the order complained against having been made in his presence their Lordships hold that he must take the consequence. It would not have mattered, even if the judgment-debtor had paid the money into Court before any application was made by the decree-holder the existence of the decree being sufficient compulsion to justify such payment.

VENKATACHALA CHETTY *v.* RAMASWAMI SERVAI, I. L. R. 55 Mad. 352 (F. B.).

RAJAH OF KALAHASTI *v.* JAGANNADHA RAYANIMGAR, I. L. R. 55 Mad. 1006: 63 M. L. J. 827.

After a temporary disturbance caused by *Palaniappa Chettiar* v. *Valliammai*[3], the *status quo ante* has been restored by the Full Bench in the first of the cases under review which holds that the legal representatives of a deceased decree-holder

1. (1871) L. R. 3 P. C. 465. 2. A. I. R. 1929 Pat. 593.
3. (1926) I. L. R. 50 Mad. 1; 51 M. L. J. 745.

can continue an application for execution presented by the latter. The same reasoning would apply to the case of judgment-debtors. There is some difficulty as to the proper article of limitation applicable to such a case. The suggestion in the Full Bench case is that Art. 181 might apply, Art. 176 being inapplicable by its language to the case of decree-holder's representative. The same difficulty, as pointed out in the latter case, does not exist in the case of the appellant and respondent in appeals from orders in execution and Arts. 176 and 177 could be applied without any violence to the language of the articles. Undoubtedly the provisions of the Code relating to death of parties after decree are confusing and the Rule Committees might well apply themselves to the task of unravelling the tangle. The confusion is thickened in the case of transfer of decrees for execution but gradually the law is getting clarified —not the least important factor in the process being the pronouncement of their Lordships of the Privy Council in *Jang Bahadur* v. *Bank of Upper India, Ltd.*[1] Their Lordships' solution is that the Court to which the decree is transferred does not lose jurisdiction by the fact of death but that before execution is proceeded with, the decree-holder must get an order for substitution from the Court which passed the decree. This, no doubt, would prevent the defeating of the decree-holder in the case of pending applications. But the same principle has been applied by the Calcutta High Court in *Manorath Das* v. *Ambika Kanta Bose*[2], *Monmotho Nath Mitter* v. *Rakhal Chandra Tewary*[3] and *Salendra Nath Ghose* v. *Surendra Nath De*[4], to cases of fresh presentation of execution petitions. Their Lordships hold therein that the representatives may apply for execution to the transferee Court and at the same time apply for substitution to the Court which passed the decree and when the order for substitution is made the order will retroact and validate the execution application from its very inception. There is no reason why the same principle should not apply to the case of a judgment-debtor dying as well.

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1. (1928) L. R. 55 I. A. 227: I. L. R. 3 Luck. 314: 55 M. L. J. 545 (P.C.).
2. (1909) 9 Cal. L. J. 443.
3. (1909) 10 Cal. L. J. 396 at 400.
4. (1929) 34 Cal. W. N. 437 at 439.

MAHOMMAD ASLAN KHAN *v.* MIAN FEROZE SHAH, L. R. 59 I. A. 386: I. L. R. 13 Lah. 687: 63 M. L. J. 694 (P. C.).

A decree for specific performance under S. 27, cl. (*b*) of the Specific Relief Act should be not only against the original contracting party but also against the subsequent transferees where they are not transferees without notice of the original contract. The conveyance ought to be by all of them. The plaintiff should ask for and obtain relief against the transferees also.

The subsequent transferees cannot resist specific performance, even if they had only constructive notice of the agreement. Actual notice is not essential. In the particular case under notice, their Lordships observe "that the original owner's dealings with his property which were undoubtedly known to the subsequent transferees were such as to put the latter upon enquiry and that if reasonable enquiries had been made by them they ***must have become*** aware of the prior agreement for sale and they could not therefore predicate of themselves that they were transferees without notice of the original contract as required by S. 27 (*b*) of the Act". It may also be noted that their Lordships allow the plaint to be amended by the insertion of a prayer for mesne profits also in the same plaint which prays for specific performance.

QADIR BAKHSH *v.* HAKAM, I. L. R. 13 Lah. 713 (F. B.).

This Full Bench decision deals exhaustively with a question of frequent occurrence on which, however, there has been a divergence of judicial views. Where a grantor alleges that a transaction apparently real was actually fictitious and was for the purpose of effecting a fraud and that the fraud was completed, can he be permitted in a Court of law, as a defendant, in possession, to say that the transaction was other than what it appears to be? Is there a distinction in such cases between the case of a plaintiff and a defendant? The Full Bench holds that, in such circumstances, the plea is open to the defendant to show the real nature of the transaction, and this is allowed not on the ground of favouring the defendant as such but as an exception, based on true grounds of public policy, to the maxim that no man alleging his own baseness ought to be heard (*Nemo allegans turpitudinem suam audiendus est*). The Calcutta, Allahabad and Lahore Courts have all along been holding this

view. But the High Courts of Bombay and of Madras have taken a different view in more recent decisions though the earlier view of those Courts also agreed with the Calcutta view. The maxim of law *"In pari delicto potior est conditio possidentis"* is the governing rule and it ought to prevail over the other maxim, where the fraud is carried out. In cases where the fraud is not carried out, it is now settled by the decision of the Privy Council in *Pethaperumal Chetty* v. *Muniandy Servai*[1] that there is a *locus poenitentiae* given to one or other of the parties. The leading judgment of the Bombay High Court which is responsible for the view that the party who *first* sets up the alleged fraud should fail whether as plaintiff or defendant, is that of Sir Lawrence Jenkins in *Sidlingappa* v. *Hirasa*[2]. This view is, however, subjected to a very critical examination by Justice Mukerjee in *Raghupati Chatterjee* v. *Nrishingha Hori Das*,[3] where he traces the evolution of the doctrine and points out how the later decisions of English Courts and the Courts of the United States of America have modified the rigour of the old decisions and have now settled upon a more severely just and true basis of law to meet such cases. The present Full Bench decision also points out how the Bombay judgment is based on old English decisions which have been modified by the later rulings and how these have not been considered by that judgment as indeed the earlier decision to the contrary of Sir Michael Westropp, C. J., in *Luckmidas Khimji* v. *Mulji Canji*[4]. The later Madras rulings have simply followed the Bombay judgment and have not examined the matter independently. As there are earlier decisions to the contrary it cannot be taken that the law is settled and the question may have to be examined afresh by a Full Bench wherever it arises. Attention may, in this connection, be drawn to the arguments reported in *Ma Ngwe Naing* v. *Maung Tha Maung*[5] where a similar question was raised before the Privy Council which, however, the Committee found it unnecessary to decide.

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1. (1908) L.R. 35 I. A. 98 : I.L.R. 35 Cal. 551 : 18 M.L.J. 277 (P. C.).
2. (1907) I.L.R. 31 Bom. 405.
3. (1923) 71 I.C. 1 : A I.R. 1923 Cal. 90.
4. (1881) I.L.R. 5 Bom. 295.
5. (1928) I.L.R. 7 R. 4 : 56 M.L.J. 244 (P.C.).

MOTIRAM ROSAN LAL COMPANY, LTD. v. COMMISSIONER OF INCOME-TAX, I.L.R. 12 Pat. 12.

The learned Judges in this case prefer to follow the Bombay Court in holding that the words "original cost to the assessee" in S. 10, cl. (2) (*vi*) of the Indian Income-tax Act (as regards the depreciation allowance on buildings, plant and furniture) means the actual genuine cost to the assessee who is being taxed and not the cost to his predecessor. They specifically dissent from the view of the Madras High Court in *Commissioner of Income-tax, Madras* v. *Messrs. Massey & Co., Ltd., Madras*[1]. It may be pointed out however that the Madras case deals with a case of a continuing business where there is a succession while in the Bombay decision, *Commissioner of Income-tax* v. *The Sarasapur Mills Company, Ahmedabad*[2], the assessee did not buy any existing business as such including its plant and machinery but was merely the purchaser of second-hand plant and machinery, the property of a Company in liquidation. The Bombay decision is therefore distinguishable. The real question is as to the meaning of the term "assessee" in the case of a succession as under S. 26 of the Act. Does the word mean "the person by whom income-tax is payable" [definition in S. 2, cl. (*g*)], or having regard to the subject or context, the original purchaser of the buildings, plant or furniture, etc., where the business is transferred to the new assessee. The question is not approached from this point of view in the decision under review. While no doubt there are obvious differences of language between the Indian Act and the English Act and also the principle of depreciation allowance is a fixed percentage in the Indian Act while it is based on "wear and tear" under the English Act, are the differences so material as to affect the construction of the Act? The benefit of the unexhausted depreciation allowance is held not to be personal under the English Law and if this is the view in Indian law also, it is certainly just and proper to hold that the cost in relation to which the fixed allowance is granted for depreciation should be the cost to the original purchaser and not the cost to the successor in business though he is the assessee. If, on the other hand, a literal interpretation of the term is preferred it would not only curtail and confine the benefit of proviso (2) to

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1. (1928) 56 M. L. J. 451 (F.B.). 2. (1931) I. L. R. 56 Bom. 129.

previous unexhausted depreciation allowance of the particular assessee but it would negative the benefit of the allowance itself in a case where there is a testamentary or intestate succession to a business as such. In such cases the cost to the actual assessee is *nil*. The Patna Court itself had held in *Maharajadhiraj of Darbhanga* v. *The Commissioner of Income-tax*[1] that a transfer of ownership of an existing business by operation of law is a succession within the meaning of S. 26, cl. (2). The Act does not impose an assessment on any person with respect to the income of a dead person to whom he has succeeded, where there has been no assessment made on such person during his lifetime. It may be that where an existing business is not continued as such by an heir, he may not be liable to be taxed under S. 26 of the Act. Where he inherits a business also as a capital asset, and elects to carry it on as a going concern, the policy of the Act seems to be to follow the business in the hands of the successor also. It would seem, therefore, the policy of the Act is better served by the view that commended itself to the Madras Court.

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1. (1932) I.L.R. 12 Pat. 5.

QASIM HUSAIN BEG *v.* KANIZ SAKINA, I. L. R. 54 All. 806.

In *Abi Dhunimsa Bibi* v. *Mahammad Fathi Uddin*[1] it was held that right to act in the matter of the dower reserved to a Mahomedan minor who has attained the age of majority according to Mahomedan law but not the age required by the Majority Act does not include the right to relinquish the right to dower which has already accrued. In this case, there was the further complication that the relinquishment of the dower took place as a consideration for the *Khula* or divorce from the husband which is also a matter in which a Mahomedan minor is entitled to act. Their Lordships dissent from the Madras view and hold that whether in settling the dower or in relinquishing it, the minor is acting in the matter of the dower within the meaning of S. 2 of the Act. One feature to be noticed is that the legislature did not regard acting in the matter of the marriage as including the dissolution of marriage, divorce being separately provided for. Again, dower is a part of the marriage contract and if such a wide construction was intended, that need not have been separately provided for. Again, such a wide construction might justify relinquishment of other rights than rights under a contract of dower—contractual rights and rights in immoveable property. It could hardly have been intended that in all these matters the minor should have a free hand. We rather think that as held in *Abi Dhunimsa Bibi* v. *Mahammad Fathi Uddin*[1] what is intended is—that in those specific matters alone, *viz.*, marriage, dower, divorce and adoption, the minor is entitled to act and not in collateral matters nor matters connected therewith but not as an integral part thereof. Marriage settlement may usually accompany marriage but is not an integral part of marriage and will not come within the rule. Some arrangements are usually made at the time of adoption but they will not bind a minor unless the guardian is a party to it.

SARABDEO BHARTHI *v.* RAM BALI, I. L. R. 54 All. 909.

Whether the decision of the Privy Council in *Mahanth Ram Charan Das* v. *Munshi Naurangi Lal*[2] governs cases of aliena-

1. (1917) I. L. R. 41 Mad. 1026: 35 M. L. J. 468.
2. (1933) L. R. 60 I. A. 124: I.L.R 12 Pat. 251; 64 M. L. J. 505 (P.C.).

tion by temple managers is not quite clear though reference in the judgment to *Velu Pandaram's case*[1] (which is the case of an alienation by the manager of a temple *kattalai*) might point to its being considered equally applicable to temple managers but it is quite certain that the decision under review cannot be good law after that decision. Their Lordships make it clear that the decision in *Vidya Varuthi* v. *Balusami Aiyar*[2] applies to all cases of alienations by matadhipathis whether the property vests in the idol or the mutt (in that case the finding was that the property vested in the idol) and equally whether the alienation is by way of lease or is an out and out alienation. They distinguish *Gnanasambanda* v. *Velu Pandaram*[1] and *Damodar Das* v. *Lakhan Das*[3] as cases of alienation of both the office and the property to which they hold the ruling would not apply and they distinguish *Subbaiya Pandaram* v. *Mahamad Mustapha Maracayar*[4] as a case of alienation by the trustee of a charity to which case also, their Lordships hold the ruling would not apply.

In the matter of AN ADVOCATE, I. L. R. 54 All. 912.

In this case a Special Bench of the Allahabad High Court held following In re *Wallace*[5] that false allegations in an application involving imputation of unfairness and impartiality to the Judges in connection with his case by an advocate acting in his individual capacity as a suitor and not as a professional man will not justify disciplinary action under the Bar Councils Act but that it is a matter for action by way of contempt. The converse, *viz.*, that if the contempt was in connection with the matter in which he acted in his professional capacity, he could be dealt with professionally is laid down in In re *Sashi Bhushan Sarbadhicary*[6]. The Courts have recently taken rather wide power in dealing with advocates and pleaders professionally for their private conduct. *Shankar Ganesh Dabir* v. *Secretary of State for India*[7]. That is on the ground that

1. (1899) L. R. 27 I. A 69: I. L. R. 23 Mad. 271, 10 M L. J. 29 (P.C).
2. (1921) L. R. 48 I. A. 302: I. L. R 44 Mad 831: 41 M L. J. 346 (P.C.).
3. (1910) L. R. 37 I. A. 147: I. L R 37 Cal. 885: 20 M. L. J. 624 (P. C).
4. (1923) L. R. 50 I. A. 295: I. L R. 46 Mad. 751: 45 M. L. J. 588 (P. C).
5. (1866) L. R. 1 P. C. 283.
6. (1906)) L. R. 34 I. A. 41: I. L. R. 29 All. 95: 17 M. L. J. 74 (P. C).
7. (1922) L. R. 49 I. A. 319; I. L. R 49 Cal. 845: 44 M. L. J. 32 (P. C).

the conduct is such as to render the pleader unfit to continue a member of the profession. Even in the case of contempt by an advocate in his individual capacity as a suitor, if the conduct involved moral turpitude of a character which "rendered him improper to remain as a practitioner of the Court," he might be dealt with professionally. In re *Wallace*[1].

KISHORI LAL *v.* BALKISHAN, I. L. R. 54 All. 824.

CHOCKALINGA *v.* PALANIAPPA, I. L. R. 55 Mad. 960: 63 M. L. J. 689.

Both these cases deal with the conditions of transfer under S. 24, Civil Procedure Code. The first deals with the case of transfer to a Court not having territorial jurisdiction but otherwise competent to deal with the case. The second with the case of transfer from a Small Cause Court to a Court not having Small Cause jurisdiction but competent to deal with it, if there was no Small Cause Court. It was held in both the cases that the transfer was good. On both the points there has been considerable divergence of opinion. *Ram Das* v. *Habib-Ullah*[2] and *Shaikh Jannat Hussain* v. *Shaikh Gulam Kutubuddin Ahmad*[3] sound a different note on the first question. *Murugesa Mudaliar* v. *Davva Venkata Kesavalu Chetty*[4] on the second. The section as it stood in the Code of 1882 permitted transfer to any Court "competent to try the same in respect of its nature and the amount or value of its subject-matter". In the Code of 1908, the words "in respect of its nature and the amount or value of its subject-matter" have been deleted giving some support to the view that territorial jurisdiction also is a condition. *Per contra*, both the cases place considerable reliance on the construction put upon the same words in S. 11, Civil Procedure Code, and the context. Those words have not precluded the Courts from holding a decision *res judicata* either because the Court had no territorial jurisdiction or because the Court where the decision is pleaded is a Small Cause Court while the decision that is pleaded was passed by a Court of original jurisdiction. The same importance is not attached to territorial competency by the Civil Procedure Code

1. (1866) L. R. 1 P. C. 283 at 295.
2. (1931) I. L. R. 53 All. 916.
3. (1920) 5 Pat. L. J. 588.
4. (1929) 56 M. L. J. 649.

as to pecuniary competence or competence in respect of the nature of subject-matter. Mr. Justice Pandalai bases an argument on the clause under which the Court to which a Small Cause suit is transferred is deemed to be a Small Cause Court. The argument based on the context is also not without weight seeing that the usefulness of the section would be reduced to the utmost if it is confined to transfer to Courts with territorial jurisdiction or Small Cause jurisdiction as the case may be.

SRI ISWARANANDA BHARATHI SWAMI *v.* HINDU RELIGIOUS ENDOWMENTS BOARD, MADRAS, I. L. R. 56 Mad. 40: 63 M. L. J. 254.

The questions that come before the Board under S. 84 of the Madras Hindu Religious Endowments Act are of great private importance; it is really a gross and wholly unwarranted interference with private rights that the legislature has been guilty of in depriving the subject of the ordinary right of appeal from the decision of the District Court in such cases and the only explanation therefor is to be found in the irresponsibility of the Indian legislatures in their new-born legislative enthusiasm. If, in addition to it, the question of taking evidence should be left to the discretion of District Judges (the matter is being dealt with summarily and in a manner wholly out of proportion to the importance of the issues involved) the situation would have become intolerable. It is a relief to find that the learned Judges have found it possible to hold on a construction of the confused provisions of the Act in favour of the right of the subject to adduce evidence in support of his claim.

MAHANTH RAM CHARAN DAS *v.* MUNSHI NAURANGI LAL AND OTHERS, L.R. 60 I. A. 124: I.L.R. 12 Lah. 251: 64 M. L. J. 505 (P. C.).

The Indian Courts have had great difficulty in reconciling the decisions of the Judicial Committee in *Gnanasambanda Pandarasannadhi* v. *Velu Pandaram*[1] and *Damodar Das* v. *Lakhan Das*[2] on the one hand with the decision of the Board in *Vidya Varuthi's case*[3]. The dictum of Earl Buckmaster in *Subbaiya Pandaram* v. *Mahamad Mustapha Maracayar*[4] rather added to the difficulty. Since then various attempts to evolve a consistent principle have been made by several judgments of the High Courts but there has been no unanimity of views. The apparent conflict between the two types of decisions has been recognised by the Board itself and when the question came before it in *Lal Chand Marwari* v. *Mahant Ramrup Gir*[5] their Lordships did not solve the difficulty but contented themselves with reserving their considered opinion for a future occasion. The present case, one should have thought, gave the Board the needed opportunity to make a full and exhaustive statement on the points which have been agitated in the Indian Courts. The judgment of the Board however does not go far enough. The attempted distinction between alienations by way of leases permanent or otherwise and sales or mortgages is definitely rejected. The series of decisions of the Patna and Calcutta Courts sounding in that direction are no longer good law. The distinction between cases where the title is in the institution and where it is in the Mahant, is again rejected. The other points of controversy still remain. Their Lordships do not say under what circumstances the possession of the alienee is not adverse during the tenure of the office of the alienor. In cases of mutts, the Board is of opinion that the alienation is good for the tenure of office of the alienor. The governing principle no doubt is the alienation is not adverse during the limited period for which it is good under the law whatever its purported duration may be. But what are the tests for applying for how long the alienation is good? It is far from clear whether the Board intends to lay

1. (1899) L. R. 27 I. A. 69: I. L. R. 23 Mad. 271: 10 M L. J. 29 (P. C.).
2. (1910) L. R. 37 I. A. 147: I. L. R. 37 Cal. 885: 20 M. L. J. 624 (P. C.).
3. (1921) L. R 48 I. A. 302: I. L. R. 44 Mad. 831: 41 M. L. J. 346 (P. C.).
4. (1923) L. R. 50 I. A. 295: I. L. R. 46 Mad. 751: 45 M. L. J 588 (P. C.).
5. (1925) L. R. 53 I. A. 24: I. L. R. 5 Pat. 312: 50 M. L. J. 289 (P. C.).

down that in all cases of mutts, the head for the time being has the power under the law to make an alienation which is good for the tenure of his office. In almost all mutts it is generally true that by the usage of the institution the head of the mutt has a sort of beneficial interest in the income which is primarily charged for the well-established purposes of the mutt. In the case of temples, on the other hand, the trustee as such has, generally speaking, no such rights although there are several cases in South India where the same person is both a trustee and an archaka, doing the duties of both and appropriating the residue of the surplus income, after providing for the worship of the deity, to his own support. Is the existence of the beneficial interest in the surplus income the real test? The view of the Madras High Court in several cases is in this direction. Their Lordships do not give the lead so clearly as one might wish. Again the way in which their Lordships distinguish *Velu Pandaram's case*[1] is somewhat cryptic. It is not clear if even in cases of temples and secular charities the alienation of some or more of the properties of the endowments (not involving the alienation or partition of the office), can be regarded as not in itself making the possession under it adverse from that date itself.

It may perhaps be useful to note that the judgment under notice does not necessarily establish that even the head of a mutt has any uncontrolled discretion in the enjoyment of the surplus income during his tenure of office. It only involves the acceptance of the position that he has enough beneficial interest to sustain the permissive character of the possession of the alienee during the limited period for which the alienation can be good in law. The observations in the judgment are from the point of view of the question of limitation only.

This judgment also approves of the view that a *de facto* trustee of a temple or a mutt can recover possession of its properties from a trespasser for and on behalf of the trust.

[END OF VOL. LXIV.]

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1. (1899) L. R. 27 I. A. 69; I. L. R. 23 Mad. 271; 10 M. L. J. 29 (P. C.).

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NOTES OF RECENT CASES.

Krishnan Pandalai, J. C. R. P. No. 1904 of 1931.
18th October, 1932.

Court Fees Act (VII of 1870), S. 7 (5) and Art. 17, Sch. II—Madras Civil Courts Act, S. 14—Suits Valuation Act, S. 4—Suit to set aside claim order and for declaration that suit property belonged to judgment-debtor, brought against both judgment-debtor and decree-holder—Nature of suit—Whether suit is within the jurisdiction of Munsif's Court.

Where in a suit to set aside a claim order and for a declaration that the suit property belonged to the judgment-debtor brought as against both the decree-holder and judgment-debtor, the value for purposes of jurisdiction was fixed as the value of the decree amount and the suit was held to be within the jurisdiction of the District Munsif's Court,

Held, (1) that Art. 17, Sch II of the Court Fees Act applied to the case and even though the judgment-debtor was a party and there was a prayer for a declaration that the immoveable property belonged to the judgment-debtor, still the suit was mainly one for setting aside the claim order;

(2) that S. 14 of the Madras Civil Courts Act applied to the case and the subject-matter of the suit should be held to be land and it ought to be valued in the manner provided under S. 7, cl. (5) of the Court Fees Act, in the absence of any rules made by the Local Government under S. 4 of the Suits Valuation Act which specifically mentions Art. 17, Sch. II; and

(3) that consequently the present suit as valued under S. 7, cl. (5) of the Court Fees Act will be within the jurisdiction of the District Munsif

35 Cal. 202 (P. C.) applied.

50 Mad. 646 and 39 Mad. 602 distinguished.

K. Balasubrahmania Aiyar for Petitioner.

N. K. Mohanarangam Pillai for Respondents.

K. C.

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Reilly and Cornish, JJ. A. S. No. 254 of 1926.
7th December, 1932.

Suit for declaration that adoption was invalid—Arrangement between parties that there should be a formal trial upon certain evidence placed before Court pursuant to the settlement—Court's decree upholding terms of settlement—Subsequent suit—Decree obtained previously set aside as got by fraud and collusion.

A daughter of one *R* sued *V* (*R's* widow), *L*, a boy alleged to have been adopted by *V* and her own sister, for a declaration that the adoption of *L* was invalid. The parties entered into a settlement but it was arranged as part of the settlement that the compromise should not be put into Court, but formal trial should be gone through. The Court gave findings upholding the terms of the settlement on the evidence which was placed before Court pursuant to the arrangement. Subsequently *P*, the son of *A*, brought another suit (present suit) for a declaration that the decree in the prior suit was not binding upon him as it was obtained by fraud and collusion.

Held, that the arrangement was a fraud and hence decree should be set aside.

Ch. Raghava Rao for Appellant.

V. Suryanarayana for Respondents.

K. C.

Pakenham Walsh, J. C. R. P. No. 1416 of 1932.
14th December, 1932.

Civil Procedure Code (V of 1908), Ss. 148 and 151—Conditional interim order—Default—Power to extend time.

Pending an appeal from a decree for possession and mesne profits against the defendant-tenant, the Court passed an order permitting the tenant to continue in possession on condition of the tenant paying the rent within a specified time every year. No payment was made within the time specified and the tenant applied to the Court to excuse the delay and extend the time for payment. The Lower Court allowed the application.

Held, that (*i*) it was not an order under O. 41, R. 5 (3), but one passed under S. 151 and so it was a case of an "act allowed," though not "prescribed" by the Code. A. I. R 1925 Pat. 153 dissented from.

(*ii*) that the previous conditional order in so far as it did not contain any provision for automatic dismissal of the application of the defendant on default by him, the application was still alive and that the Court had the power to extend the time. 53 M. L. J. 494 and (1896) 1 Ch. 644 distinguished.

S. Ramachandra Aiyar for Petitioner.

K. S. Sankara Aiyar for Respondent.

S. R.

Walsh, J. C. R. P. No. 1090 of 1932.
3rd January, 1933.

Decree—Execution—Decree for debts of last male owner against a widow entitled to a life-estate under the former's will—Daughter entitled to remainder under will, exonerated—Execution against daughter as legal representative of the widow seeking to sell the property in remainder—Whether maintainable—No decree against assets of deceased person but only against the debts in possession of assets of deceased.

In a suit for a sum of money due by the last male owner, a suit was brought against the widows, his daughter and others as being in possession of the properties of the deceased. Pending the suit the daughter and others were exonerated and a decree was passed after contest against the widows alone. The last male owner had executed a will by which he bequeathed the life-interest in a house to one of his widows, the 2nd defendant, and the remainder absolutely to her daughter, the 4th defendant, in the suit. Execution was taken out, of the decree, after the death of the 2nd defendant and against the 4th defendant as her legal representative seeking to bring to sale the house which she got absolutely under her father's will.

Held, that by the exoneration of the daughter, the 4th defendant, in the suit, the plaintiff was precluded from executing the decree against the house which was bequeathed for life to the widow and the remainder to the daughter. The cases, where a decree obtained against a wrong legal representative in possession of the deceased's assets was sought to be executed against a right legal representative, had no application to the present case.

50 M. L. J. 442 and 29 M. L. J. 698 distinguished.

There can be no decree as such as against the assets of a deceased person apart from the persons in possession of such assets.

Judgment in Letters Patent Appeal No. 290 of 1927 (unreported) followed.

C. A. Seshagiri Sastri for *Watrap S. Subramania Aiyar* for Petitioner.

R. Gopalaswami Aiyangar for Respondent.

K. C.

Walsh, J. C. M. S. A. No. 27 of 1929.
4th January, 1933.

Powers of executing Court—Jurisdiction to go into a question of disputed point of fact.

N R C

When there is no want of jurisdiction apparent on the face of the decree, the party in execution cannot raise a disputed point of fact, which, if his contention were true, would have deprived the Court of its jurisdiction to pass a decree in that matter:

28 Mad. 84; 45 Mad. 620 and 43 All. 547 distinguished.

T. M. Ramaswami Aiyar and *A. Nagaswami Aiyar* for Appellants.

S. Narayana Aiyangar for Respondent.

K. C.

Ramesam, Anantakrishna Aiyar and Cornish, JJ. C. M. A. No. 296 of 1929.
5th January, 1933.

Civil Procedure Code (V of 1908), S. 145 (c)—Scope of—No order allowing next friend of a minor to receive money of minor and keep it with himself—Applicability of O. 32, R. 6 of Civil Procedure Code.

A Court merely ordered that a next friend of a minor decree-holder should be allowed to draw out the money paid into Court by the judgment-debtor in satisfaction of the decree in suit, and after deducting expenses of the suit should purchase Government Promissory Notes for the balance and deposit the same into Court. Another person executed a surety bond binding himself responsible for the said amount till the next friend deposited in Court the Government Promissory Notes. The next friend died without ever depositing any Government Promissory Notes and when the minor on attaining majority, filed an application under S. 145, Civil Procedure Code, for execution against the surety and the Lower Court dismissed it relying on 41 Mad. 40;

Held, (1) that in 41 Mad. 40 leave was granted to minor's next friend to receive and keep minor's money so that that case was one to which O. 32, R. 6 applied and the present case was distinguishable on facts;

(2) that although the suit would be at an end after payment of decree amount by the judgment-debtor, still any proceeding taken for disbursement of the said amount would be "a proceeding consequent on the suit" within the meaning of S. 145 (*c*) so that execution might be ordered against the surety under that clause of the section.

B. Satyanarayana for Appellant.

Y. Suryanarayana and *Kasturi Seshagiri Rao* for Respondents.

K. C.

Curgenven, J. C. R. P. No. 736 of 1931.
7th December, 1932.

Arbitration—Award—Arbitrators extending enquiry beyond scope of pleadings—Validity—Consent of parties whether cures defect—Civil Procedure Code, 1908, O. 32, R. 7—Guardian being party to arbitration—Omission to obtain sanction of Court—Right to object to award.

When a dispute is referred to arbitrators through Court the scope of the enquiry is the scope of the suit itself as disclosed by the pleadings and they have no jurisdiction to extend it either as regards the subject-matter or the persons affected by it. Where an award is vitiated by the circumstance that it departs from the pleadings it cannot be cured by the valid consent of all the parties. The arbitrators who exceed their duty and the Court which nevertheless passes a decree in terms of the award would be acting in excess of jurisdiction so as to justify the High Court's interference in revision.

53 Cal. 258 (P. C.) and 49 M. L. J. 523 relied on.

Where the guardian of a minor enters into an agreement and submits to arbitration he cannot subsequently turn round and impeach the award on the ground that the sanction of the Court had not been obtained under O. 32, R. 7, Civil Procedure Code.

58 Cal. 628 relied on.

P. Satyanarayana Rao for Petitioner.

G. Lakshmanna, G. Chandrasekhara Sastri, K. Kottayya, V. Krishna Mohan, J. Sambasiva Rao and *N. V. Shiva Rao* for Respondents.

B. V. V.

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Madhavan Nair and Jackson, JJ. A. S. No. 373 of 1926.
15th December, 1932.

Transfer of Property Act (IV of 1882), S. 6 (e)*—Rights of Hindu reversioner—Agreement to transfer—Effect—Suit for refund of purchase money advanced—Limitation Act, 1908, Art. 62.*

An agreement for the sale of the rights of a Hindu reversioner to be carried out after the death of the widow is merely an agreement for the sale of an expectancy or *spes successionis* and is therefore void. In such a case a claim for refund of the purchase money paid in pursuance of the agreement will be governed by Art. 62 of the Limitation Act and the period commences to run from the date of the agreement itself.

48 M. L. J. 598 and 50 Cal. 929 relied on.

45 All. 179 distinguished.

N. R. C.

P. V. Vallabhacharyalu for Appellants.

G. Lakshmanna and *G. Chandrasekhara Sastri* for Respondents.

B. V. V.

Ramesam, Anantakrishna Aiyar and Cornish, JJ. A. S. No. 367 of 1928.
9th January, 1933.

Penalty—Mortgage bond—Interest at 12 per cent.—On default interest at 13½ per cent. compound—If penal—Creditor if entitled to compound interest at the original 12 per cent. at least.

A mortgage bond provided for repayment of the mortgage amount at the end of one year with interest at 12 per cent. per annum and in default compound interest at 13½ per cent. per annum was provided for.

Held, by the Full Bench, that the provision for payment of compound interest at an enhanced rate was penal; that such provision cannot be split up into two, consisting of a provision for compound interest at the original rate and a provision for a higher rate of interest so as to uphold the first by itself and that though the Court may in its discretion award compound interest at the original rate by way of compensation, the creditor was not as a matter of right entitled to the award of compound interest.

S. Varadachariar, T. Ramachandra Rao and *A. Venkatachellam* for Appellant.

Alladi Krishnaswami Aiyar and *B. Satyanarayana* for Respondents.

S. V. V.

Pakenham Walsh, J. C. M. S. A. No. 34 of 1928.
10th January, 1933.

Limitation Act (IX of 1908), Art. 182 (5)—Step-in-aid of execution—Application for time to file application for substituted service—Limitation if saved—Plea of limitation—Need for setting out grounds in execution application—Dismissal of application for non-payment of batta—Revival.

An application for a step-in-aid of execution must satisfy two conditions: the step must be one to be taken by the Court and the applicant should ask the Court to take it. An application for time to file an application for substituted service is not a step-in-aid so as to save limitation.

51 M. L. J. 480 and 53 M. L. J. 766 relied on.

Every ground of exemption from limitation must be specifically set out in the execution application and a ground not so set out cannot be relied on.

An execution application can be dismissed for non-payment of batta and such dismissal is not a dismissal for statistical purposes so as to be revived by a later application.

4 L. W. 112 followed.

S. R. Muthusami Aiyar for Appellant.

A. Nagaswami Aiyar for Respondent.

B. V. V.

Pakenham Walsh, J. C. R. P. No. 534 of 1928.
11th January, 1933.

Execution—Sureties executing bond—Non-compliance with order of Court—Application for arrest of sureties—Procedure.

Where the properties of a judgment-debtor were attached and certain sureties executed a bond for the production of the articles and the decree-holder subsequently applied for the arrest of the sureties on the ground that they did not produce the articles,

Held, that the application for the arrest of the sureties could not be made in the absence of an order of Court under the bond in an application to which the sureties were parties.

42 All. 171 (P. C.) and 51 M. L. J. 239 referred to.

T. R. Srinivasa Aiyangar for Petitioner.

M. S. Venkatarama Aiyar for Respondent.

B. V. V.

Pakenham Walsh, J. C. M. S. A. No. 168 of 1930
17th January, 1933. and
C. R. P. No. 1232 of 1928.

Civil Procedure Code (V of 1908), Ss. 47 and 151 and O. 21, R. 90—Sale in execution of decree—Refusal to confirm sale—Appeal and second appeal, whether lie—Sale of more lots of properties than would satisfy decree-holder—Court's powers under S. 151 of the Civil Procedure Code to refuse to accept bids when notice of the fact of more lots than necessary being sold, not brought to it.

Where the executing Court refuses to confirm a sale in execution under its inherent power and not under O. 21, R. 90, Civil Procedure Code, an appeal and a second appeal lie against the order of the executing Court.

47 M. L. J. 549 followed.

Where the executing Court instructed the Deputy Nazar to sell only so much of the properties of the judgment-debtor as would suffice to satisfy the decree but the latter sold more, while the sale of

some of the lots only would satisfy the decree, which fact was not brought to the notice of the Court which in consequence accepted the bids of all the properties, the Court can refuse to confirm the sale of more properties than are needed to satisfy the decree under its inherent powers reserved under S. 151 of the Civil Procedure Code.

Case-law reviewed.

23 W. R. 1 and 393 distinguished.

C. A. Seshagiri Sastri for Appellant.

S. Rajarama Aiyar for Respondent.

K. C.

Pakenham Walsh, J. C. M. S. A. No. 147 of 1929.
18th January, 1933.

Provincial Insolvency Act (V of 1920), Ss. 4 and 68—Claim application enquired into with consent of parties by the Official Receiver and disallowed—Application under S. 4 to the Insolvency Court impugning jurisdiction of Official Receiver—Jurisdiction—Whether S. 4 gave powers to Court—Official Receiver not a Court but an executive officer—Insolvency Court's jurisdiction to set right Official Receiver's mistakes.

A claim petition was enquired into by an Official Receiver by consent of parties and the claim was disallowed. A fresh application was filed by the claimant under S. 4, Provincial Insolvency Act, before the Insolvency Court impugning the jurisdiction of the Official Receiver to dispose of the matter. The claim was allowed and confirmed in appeal. It was contended in Second Appeal that the only remedy against the Official Receiver's order was an appeal against his order under S. 68, and that no application lay under S. 4.

Held, (1) that the Official Receiver is only an executive officer and not a Court. 22 C. W. N. 704 referred to.

(2) that the Insolvency Court has inherent jurisdiction to set right Official Receiver's errors and has ample powers under S. 4.

47 Mad. 446 followed.

18 L. W. 282 distinguished.

1 Lah. 307 and A. I. R. 1932 Lah. 84 referred to.

V. Balasundaram Aiyar for Appellant.

N. S. Mani for Respondent.

K. C.

Madhavan Nair and Jackson, JJ. A. S. No. 63 of 1927.
17th January, 1933.

Security bond—Sale subject to security—Decree-holder proceeding against other properties of judgment-debtor—Suit against decree-holder and purchaser—Indemnity for judgment debt from purchaser—If entitled to—Limitation—Art. 132 or Art. 120 applicable.

A judgment-debtor executed a security bond in favour of the District Court in compliance with an order of the High Court making it a condition of stay of execution pending an appeal from the Lower Court's decree. The appeal was eventually dismissed. Before the decree could be executed by sale of the security properties, they were purchased by a third person in execution of another money decree, but the sale was made subject to the security. The former decree-holder instead of proceeding against the security properties sought to realise his decree amount from the other properties of the judgment-debtor. The legal representative of the judgment-debtor filed a suit against the decree-holder and the purchaser of the security properties claiming that he was entitled to an indemnity from the purchaser in respect of the judgment debt and praying that they may be sold and the proceeds applied in satisfaction of the balance of the decree debt and the surplus, if any, paid over to him to the extent of moneys already recovered from his estate in satisfaction of the decree.

Held, that such a suit was maintainable though the plaintiff had not paid up the whole amount of the decree, that the plaintiff was entitled to the indemnity claim and that the suit was governed by Art. 132 and not by Art. 120 as it was to enforce a charge by sale of the properties.

P. Venkataramana Rao and *V. S. Narasimhachari* for Appellant.

S. Varadachariar and *A. Ramachandra Aiyar* for Respondent.

S. V. V.

Ramesam, Anantakrishna Aiyar and Cornish, JJ. C. M. S. A. No. 182 of 1931 and C. M. A. No. 481 of 1930.
18th January, 1933.

Mortgage—Prior mortgagee's suit without impleading puisne mortgagee—Subsequent mortgagee's suit without impleading prior mortgagee—Sale in consequence of decree in the suit preceding execution in prior suit—Prior purchaser entitled to retain possession.

Where a prior mortgagee brings a suit on his mortgage without impleading the puisne mortgagee but only the mortgagor and before the sale in execution of the decree in such a suit the puisne mort-

gagee brings a suit on his mortgage without impleading the prior mortgagee as a party and obtains a decree, and the mortgaged properties are sold in execution in both the suits, the prior purchaser in execution is entitled to retain possession, irrespective of the fact that the mortgage in execution of which such sale takes place is the prior or puisne mortgage.

40 Mad. 77 explained.

Case-law reviewed.

T. M. Krishnaswami Aiyar and *B. R. Chakravarthi* for Appellant in C. M. S. A. No. 182 of 1931.

T. R. Venkatarama Sastri and *M. S. Vaidyanatha Aiyar* for Respondent in C. M. S. A. No. 182 of 1931.

K. V. Sesha Aiyangar and *T. R. Ramachandran* for Appellant in C. M. A. No. 481 of 1930.

C. A. Seshagiri Sastri for Respondent in C. M. A. No. 481 of 1930.

K. C.

Ramesam, Anantakrishna Aiyar and Cornish, JJ. C. R. P. No. 790 of 1931.

19th January, 1933.

Hindu Law — Minor — Suit for partition — Death of minor pending suit—Legal representative if can come on to continue the suit or the suit abates.

A mother instituted a suit for partition on behalf of her minor son against his coparceners alleging circumstances which if proved would have justified a decree in favour of the minor. The minor plaintiff however died before the suit came on for trial and the mother applied to be impleaded as his legal representative on the footing that the minor must be deemed to have become divided as from the date of the institution of the suit.

Held, that the guardian of the minor was entitled to act for him in expressing his intention to become divided from the rest of the family and that such expression of intention would become operative from the date of the institution of the suit, if the Court is satisfied that the suit was instituted for the benefit of the minor. It is immaterial that the minor dies before the passing of the preliminary decree as it is not the decree that effects the severance of status.

S. Varadachariar and *B. T. M. Raghavachariar* for Petitioner.

G. Lakshmanna and *G. Chandrasekhara Sastri* for Respondent.

S. V. V.

The Chief Justice and Bardswell, J. L. P. A. No. 4 of 1930.
24th January, 1933.

Civil Procedure Code (V of 1908), O. 22, R. 5—Legal representative—Claiming as legatee under a will, to be brought on record—Question of genuineness of will found by Judge sitting in admission—Letters Patent appeal against his order—Whether lies under Letters Patent, cl. 15.

Where in a pending first appeal the appellant died and a person who claiming to be the sole legatee under a will left by the deceased applied to be brought on record as his legal representative and was opposed, and an enquiry having been held by the Lower Court and the Judge sitting in admission having found the will genuine and directed under O. 22, R. 5, Civil Procedure Code, that the petitioner should be brought on record, the respondent in the appeal preferred a Letters Patent appeal,

Held, on a preliminary objection, that no appeal would lie under cl. 15 of Letters Patent, that the test laid down in 35 Mad. 1 at page 7 that the order to be appealable must "put an end to the suit or proceeding so far as the Court before which the suit or proceeding pending is concerned" was not satisfied in the present instance and hence no appeal would lie.

N. S. Srinivasa Aiyar for Appellant.

K. Bhashyam Aiyangar and *T. R. Srinivasa Aiyangar* for Respondents.

K. C.

The Chief Justice and Bardswell, J. L. P. A. No. 71 of 1932.
26th January, 1933.

Madras Co-operative Societies Act (VI of 1932), S. 51—Director of Co-operative Bank also acting as its Vakil—Dispute between Bank and Vakil—Reference to Deputy Registrar—Validity—Writ of prohibition—Legal practitioner being Director of Society—Appearance as vakil of Society—Propriety—Madras Co-operative Societies Act (II of 1912).

The Director of a Co-operative Bank, who also acted as its legal adviser and Vakil, was called to account for certain sums of money received by him from the Bank while acting as its Vakil and he having failed to do so a reference was made by the Deputy Registrar of Co-operative Societies under S. 51 of the Madras Co-operative Societies Act, 1932.

Held, that the matters complained of related to the conduct of the Vakil acting as such and not as a member, officer or agent of

the Society and the Registrar had no jurisdiction to entertain the reference. Writ of prohibition issued.

Merely because a legal practitioner is a member of a society he is not prevented by any rule of professional etiquette from accepting instructions from the society of which he is a member. But the conduct of a person acting as paid legal adviser of a society and also as its Vakil while being a director is improper.

T. R. Venkatarama Sastri and *P. S. Narayanaswami Aiyar* for Appellant.

The Government Pleader (*P. Venkataramana Rao*) and *P. Govinda Menon* for Respondents.

B. V. V.

The Chief Justice and Bardswell, J. L. P. A. No. 296 of 1926.

26th January, 1933.

Civil Procedure Code (*V of 1908*), *S. 11*—Res judicata *between co-defendants—Essentials.*

In order that a decision may operate as *res judicata* between co-defendants (1) there must be a conflict of interest between them, (2) it must be necessary to decide that conflict in order to give the plaintiff the relief which he claims, and (3) the question between the defendants must have been finally decided.

53 All. 103 (P. C.) relied on.

T. R. Venkatarama Sastri and *L. P. Sivasubramaniam* for Appellant.

S. T. Srinivasagopalachari for Respondents.

B. V. V.

Pakenham Walsh, J. C. M. S. A. No. 76 of 1929.
18th January, 1933.

Civil Procedure Code (V of 1908), O. 40, R. 1—Suit already disposed of—Receiver if can be appointed—Hindu Law—Suit by reversioner for injunction against widow—Court if entitled to appoint Receiver.

Where a reversioner filed a suit against a Hindu widow and certain relations of hers to whose name she had transferred the assets of her husband, for a declaration of his reversionership and injunction to restrain her from committing waste, the Court found the plaintiff was the reversioner, that the widow had committed waste and that the widow was doing it to the detriment of the reversioner, but held that an injunction would only result in making collection difficult and the appointment of a Receiver was alone the proper remedy and directed the plaintiff to apply for the appointment of a suitable person as a Receiver; whereupon, the plaintiff put in such an application on which the Court appointed a Receiver. On appeal the said order was reversed by the Lower Appellate Court on the ground that the Court, having already disposed of the suit, had no longer any jurisdiction to appoint a Receiver. Further, the suit being one for injunction and Receiver being a larger remedy than an injunction, it could not even have been decreed and could not therefore be granted on an application in such a suit.

Held, (1) that the appointment of a Receiver was the proper remedy under the circumstances;

(2) that though a Hindu reversioner was not entitled to possession during the lifetime of the widow and could never sue the widow for possession, he had the right to have a Receiver put upon the estate under circumstances threatening waste.

I. L. R. 44 M. 984 followed, and

(3) O. 40, R. 1, Civil Procedure Code, enabled the Court to appoint a Receiver even after the decree and the fact that the suit had been already disposed of did not take away the jurisdiction of the Court to appoint the Receiver.

Watrap S. Subrahmania Aiyar for Appellant.

A. K. Madhava Rao for Respondent.

K. C.

Curgenven and Sundaram Chetty, JJ. A. S. No. 10 of 1927.
23rd January, 1933.

Transfer of Property Act (IV of 1882), S. 101—Subrogation—Purchase of property subject to two mortgages—Purchaser directed

to discharge both mortgages from out of the consideration for the purchase—Earlier mortgage alone discharged by purchaser—Suit by the later mortgagee—Priority in respect of the earlier mortgage—Purchaser, if entitled to plead.

Where the purchaser of a property was directed by the sale deed to discharge two mortgages and he discharges only one of them, the earlier, but fails to discharge the later mortgage, whereupon the later mortgagee files a suit for sale on his mortgage in which the purchaser pleads priority in respect of the earlier mortgage which he has discharged,

Held, that the purchaser is entitled to priority in respect of the earlier mortgage.

45 M. L. J. 693 explained and distinguished.

Watrap S. Subrahmania Aiyar for Appellant.

T. S. Venkateswara Aiyar for Respondent.

K. C.

Madhavan Nair and Jackson, JJ. A. S. No. 131 of 1927.
26th January, 1933.

Charitable and Religious Trusts Act (XIV of 1920)—Petition under S. 3—Directions of Court under S. 5 not complied with by trustee—Permission granted by Court under S. 6 for filing a suit under S. 92, Civil Procedure Code—Subsequent suit under S. 92, Civil Procedure Code, by the petitioner and two others having no sanction—Petitioner and 3rd plaintiff withdrawing from the suit—If 2nd plaintiff alone competent to prosecute the suit.

The petitioner moved the District Court under Act XIV of 1920 for directions calling on the respondent (trustee) to furnish information regarding the trust. The directions called for by Court not having been complied with by the trustee, the petitioner and two others having no separate sanction filed the suit under S. 92, Civil Procedure Code. During the course of the suit, however, the petitioner and the 3rd plaintiff withdrew from the suit and the Sub-Judge held that the suit was not validly instituted as the other two plaintiffs had not the requisite sanction and as the petitioner and the 3rd plaintiff withdrew from the suit the 2nd plaintiff alone could not continue the suit; the section requiring at least two plaintiffs.

Held, that S. 6 of the Charitable and Religious Trusts Act generally authorised the institution of a suit under S. 92, Civil Procedure Code and had no reference whatever either to the *personnel* or the number of the plaintiffs bringing the suit and that the 2nd plaintiff was therefore perfectly competent to prosecute the suit.

P. R. Ganapathi Aiyar and *V. Krishna Mohan* for Appellant.

P. Somasundaram for Respondent.

S. V. V.

Beasley, C. J. C. R. P. No. 1930 of 1930.
9th February, 1933.

Civil Procedure Code (V of 1908), S. 115, O. 21, Rr. 85 and 86—Court-sale—Auction-purchaser—Date of payment falling in summer recess—When amount should be paid.

When a Court-sale in execution of a decree was held before the Court closed for summer recess, but the 15th day for payment of balance under O. 21, R. 85 fell during the recess of summer,

Held, (1) that the auction-purchaser could pay the amount on the re-opening day after recess, *vide* S. 10, General Clauses Act;

(2) that the payment into Court consists of all the acts mentioned in the Civil Rules of Practice, *i. e.*, taking of the chalan, payment into Bank, filing Bank receipt into Court and taking a receipt from the Judge; and

(3) that Lower Court's order refusing to confirm sale was liable to be set aside in revision.

Y. Suryanarayana for Petitioner.

V. Govindarajachari for Respondent.

K. C.

Curgenven and Sundaram Chetty, JJ. A. S. No. 45 of 1927.
10th February, 1933.

Cotton Duties Act (II of 1896), Ss. 6, 8, 9 and 10—Factory owner—Non-furnishing of returns and non-assessment of duty for 10 years—Right of Government to assess duty according to its best judgment and to recover duty for back years.

A mill producing cotton goods assessable (under the now repealed Cotton Duties Act II of 1896) to duty, did not furnish the statutory monthly returns and was not assessed to duty by the Government for a period of 10 years at the end of which period the Government suddenly called upon the mill-owner to furnish returns for 10 years. The mill-owner failing to make such a return, the Government assessed him at its own discretion and recovered the duty. The mill-owner sued to recover the duty collected, on the ground the assessment and levy were not justified by the Act.

Held, that in the absence of a return furnished by the assessee in accordance with the statute, assessment in accordance with the best judgment of the assessing authority was not illegal.

Held also, that the Act did not prohibit the recovery of duties which had not been assessed for a period of ten years.

K. V. Sesha Aiyangar for Appellant.

The Government Pleader (P. Venkataramana Rao) for Respondent.

K. C.

Burn, J. C. M. P. No. 336 of 1933.
13th February, 1933.

Civil Procedure Code (V of 1908), O. 32, R. 7—Pendency of appeal—Sale by guardian of minor (respondent's) properties purchased in Court auction—Purchaser applying to be impleaded as a party respondent in the appeal—Whether guardian's action was governed by the provision in R. 7 of O. 32—Sanction of Court when necessary.

Pending an appeal, certain creditors of the respondent obtained decrees against him and brought his properties to sale. One of them was a minor whose guardian purchased on his behalf in Court auction a few items of properties. Then on the guardian's application, the minor was impleaded as respondent in the appeal. The guardian sold the properties so purchased to a third person who applied to be impleaded as respondent in the appeal and the application being opposed on the ground that the sale by the guardian required sanction under O. 32, R. 7 of the Civil Procedure Code,

Held, that O. 32, R. 7 will apply only to an action taken by the guardian in the nature of a compromise or withdrawal or any agreement to that effect.

Held, further, that as the guardian sold the properties which were bought in Court auction, no sanction was necessary, though it might be otherwise if the decree, in execution of which they were purchased, was sought to be assigned.

41 M. L. J. 75 distinguished.

K. Bhashyam Aiyangar for Petitioner.

L. A. Govindaraghava Aiyar, P. S. Ramachandra Aiyar, K. S. Desikan, T. R. Srinivasan and *R. Desikan* for Respondents.

K. C.

Walsh, J. C. M. S. A. No. 132 of 1929.
27th January, 1933.

Agency Tracts Interest and Land Transfer Act (I of 1917)—Section 7 and rules framed thereunder—Rule 48 of the Ganjam and Vizagapatam Agency Rules—If Second Appeal lies.

No Second Appeal lies either under the Agency Tracts Interest and Land Transfer Act or under Rule 48 of the Ganjam and Vizagapatam Agency Rules against the judgment of the Agent to the Governor, Vizagapatam, in appeal against the decision of the Special Assistant Agent, Narasapatam, in an application to obtain an order of ejectment against a transferee on the ground that the same was in contravention of the provisions of the Agency Tracts Interest and Land Transfer Act.

B. Jagannadha Doss for Appellant.

V. Govindarajachari for Respondents.

K. C.

Pakenham Walsh, J. C. M. S. A. No. 70 of 1929.
31st January, 1933.

Provincial Insolvency Act (V of 1920), Ss. 4, 56 and 75—Hindu father—Insolvency—Decree for partition in suit filed by the sons after father's adjudication—Mortgage by father executed prior to adjudication found binding upon the sons—Application by mortgagee to have the mortgaged property sold by Official Receiver free of the mortgage—Official Receiver agreeing on grant of substantial concessions by the mortgagee—Sale—Objection by minor sons to delivery of possession—Purchaser if entitled to have obstruction removed—Mortgage debt binding upon the minor sons in the partition decree—Right, title and interest of father alone would pass to purchaser—Purchaser should bring a suit for possession of sons' shares—Second Appeal against the appellate order—If competent.

An undivided Hindu father was adjudicated insolvent. The mortgagee from the father applied in the Insolvency to have the property mortgaged sold free of his encumbrance and the property was advertised for sale. The undivided sons of the insolvent filed a suit for partition impleading the mortgagee and the Official Receiver in which an issue was raised as to the binding character of the mortgage. The Court found the mortgage was valid and binding on the minor sons and gave a decree for partition subject to the mortgage. Thereupon the Official Receiver applied to the Insolvency Court to sell the entire property including the sons' shares free of the mortgage in view of the fact that the mortgagee was prepared to forego a substantial amount by way of interest and the estate stood to gain also by the saving of the Court-

fee and vakil's fee which it would have to bear if the mortgagee filed a regular suit on his mortgage. The Insolvency Court permitted the same. On the date of the sale the minor sons intervened with a petition before the Official Receiver praying for the exclusion of their shares from the sale. The petition was dismissed by the Official Receiver who had the entire property sold for the mortgage debt. The mortgagee himself purchased the property.

The purchaser applied for delivery of possession but was obstructed by the mother of the minor sons. Thereupon he applied for delivery of possession removing the obstruction under Ss. 4 and 56 of the Provincial Insolvency Act and O. 21, R. 95 of the Civil Procedure Code. The Insolvency Court (the Sub-Court) directed delivery removing the obstruction. But on appeal the District Court held that only the father's share passed by the sale and that anyhow the purchaser could not obtain possession of the sons' shares in an application under S. 4 but should have filed a regular suit.

On the contention that an application under S. 4 being incompetent no Second Appeal would lie to the High Court.

Held, (*i*) that the Second Appeal was competent.

9 P. 685 followed; 60 M. L. J. 167 distinguished.

(*ii*) that the sale having been held after the decree for partition, only the right, title and interest of the insolvent father can pass to the auction purchaser under the Official Receiver's sale, even though as a matter of fact what was intended to be sold was the entire property including the shares of the sons.

I. L. R. 44 Cal. 524 (P. C.) distinguished.

(*iii*) that the purchaser was not entitled to obtain possession of the sons' shares in an application under S. 4 of the Provincial Insolvency Act but that he must file a suit therefor.

I. L. R. 51 M. 567 followed, and

(*iv*) that though the provisions of O. 21, Civil Procedure Code, may not apply in terms to an Insolvency Court, that Court has powers analogous to that of O. 21, Civil Procedure Code and can execute its own orders.

Quaere: Whether an Insolvency Court has the right to adjudicate on the binding character of a debt contracted by a Hindu father so as to authorise the sale of the sons' shares also by the Official Receiver?

I. L. R. 54 M. 479 and I. L. R. 55 M. 558 considered.

Watrap S. Subrahmania Aiyar for Appellant.

A. C. Sampath Aiyangar for Respondent.

K. C.

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Curgenven and Sundaram Chetty, JJ. A. S. No. 46 of 1927.
1st February, 1933.

Interest Act (XXXII of 1839)—Interest as damages—Usufructuary mortgagee stipulating to pay peishcush and land cess to Government—Mortgagee defaulted when mortgagor paid—Suit for recovery of damages by mortgagor for breach of stipulation—Whether interest payable on the amount so paid as damages from date of payment till date of suit.

In a suit by a mortgagor against a usufructuary mortgagee for damages for breach of the covenant in the mortgage to pay the peishcush and land cess payable in respect of the mortgaged lands, the mortgagor claimed interest on the amounts paid by him towards peishcush and land cess from dates of payment till the date of suit.

Held, the mortgagor was not entitled to any interest before suit as interest could not be allowed under S. 73 of the Contract Act by way of damages. Also the Interest Act did not apply, because the conditions necessary for the granting of interest under the Interest Act were not satisfied nor could the Court award interest by way of damages for wrongful retention of money under any general equitable jurisdiction.

Case-law reviewed.

50 Mad. 94 (F. B.), 31 L. W. 655 and 57 M. L. J. 662 (P. C.) followed.

26 I. C. 429, 21 I. C. 543, 7 M. L. T. 108 and 7 Ch. D. 494 referred to.

V. Govindarajachari and *N. Vasudeva Rao* for Appellant.

B. Jagannadha Doss for Respondent.

K. C.

Curgenven and Sundaram Chetty, JJ. A. S. Nos. 59 and 157 of 1927.
14th February, 1933.

Registration Act (XVI of 1908), Ss. 17 and 49—Lease for agricultural purposes—Reduced to writing—Necessity for registration—Party objecting to admissibility—Suppression of document—Effect of S. 65, Evidence Act—Secondary evidence—If can be relied on—Sale by auction—Transaction when complete.

Plaintiff let out his lands for agricultural lease for seven years. The lease right was sold in auction and the 1st defendant's highest bid was duly accepted. Soon after auction, an auction list was signed by plaintiff's dewan. Next day a muchilika was executed by 1st defendant. Both these documents were with the plaintiff and he did not produce them. About a month later an agreement

was executed setting out the terms. Even prior to the last mentioned agreement the defendant was let into possession and the instalments of lease amount also were being paid. The Trial Court held that all the said three documents being reduced to writing were invalid for want of registration and were inadmissible in evidence.

Held, (*i*) that the lease transaction was complete in law on the acceptance of the defendant's bid at the auction and the relationship of landlord and tenant was constituted.

13 W. R. 4 (P. C.) and 28 M. L. J. 617 followed.

(*ii*) that the party raising objection as to non-registration having suppressed the documents himself, every presumption should be drawn against him and he cannot rely on secondary evidence consisting of admissions by the witness on the other side, as secondary evidence of terms is prohibited under S. 65 of the Evidence Act;

(*iii*) that having regard to the anterior conduct of parties and the auction and the execution of earlier documents, the later agreement was merely the record of a past transaction already completed and did not embody the transaction or constitute the lease deed between the parties and so did not require registration.

50 Cal. 338 (P. C.) referred to.

K. Rajah Aiyar, K. Venkateswara Aiyar and *K. S. Rajagopalachari* for Appellant.

Sir A. Krishnaswami Aiyar (*Advocate-General*) and *L. S. Veeraraghava Aiyar* for Respondent.

K. C.

Ramesam and Cornish, JJ. A. S. No. 26 of 1927.
3rd February, 1933.

Negotiable Instruments Act (XXVI of 1881), S. 43—Promissory note for Rs. 9,000—Executant contracted to receive and was paid only Rs. 2,000—Suit on the pronote—Whether decree can be given for the whole amount.

When the executant of a pronote executed a promissory note for Rs. 9,000 and contracted to receive and received only Rs. 2,000,

Held, that S. 43 of the Negotiable Instruments Act did not apply and there was no partial failure of consideration, as the promisor never expected to receive more than Rs. 2,000, and that the plaintiff was consequently entitled to a decree for the whole amount due under the pronote.

V. Suryanarayana for Appellant.

V. Govindarajachari and *B. V. Ramanarasu* for Respondents.

K. C.

Chief Justice and C. R. Ps. Nos. 1335 to 1338 of 1928.
Bardswell, J.
16th February, 1933.

Civil Procedure Code (V of 1908), S. 73 and O. 21, Rr. 84 and 85—Application for rateable distribution—Sale of property in execution of decree—Executing decree-holder obtained permission to bid and to set-off—Applications for rateable distribution filed after sale—Whether rateable distribution could be granted.

In execution of a decree, the decree-holder obtained permission from the Court to bid at the sale and to set-off the bid amount towards the decree debt. The properties of the judgment-debtor were put to auction and were knocked down in favour of the decree-holder for an amount which was less than the amount of the decree. A few minutes later, some persons who held decrees against the same debtor put in applications for rateable distribution of the sale proceeds.

Held, the assets should be deemed to have been realised *eo instanti* the sale was knocked down and to have been paid over to the decree-holder as he obtained permission to set-off. The applications for rateable distribution being later than the sale, there were no assets available for distribution at the time they were filed.

The decision of Ramesam, J., in 1930 M. W. N. 568 followed.

G. Lakshmanna and *G. Chandrasekhara Sastri* for Petitioner.

P. Satyanarayana Rao for *V. Govindarajachari* for Respondent.

K. C.

N R C

Burn, J. Cr. R. C. No. 916 of 1932.
16th February, 1933.

Criminal Procedure Code (V of 1898), S. 423 (1) (c) and (d) —Powers of the Appellate Court in security proceedings—Ordering a de novo *trial without jurisdiction.*

Where in security proceedings under S. 107, the trial Magistrate directed that security should be taken but the Sessions Judge in appeal set aside the trial Court's judgment as defective and ordered a *de novo* trial,

Held, in revision, that the learned Sessions Judge could only either alter or reverse the trial Court's order, under S. 423 (1) (*c*), but could not order a *de novo* enquiry and that the learned Sessions Judge's order for *de novo* enquiry was without jurisdiction.

Held also, that in view of the observations of the learned Sessions Judge in his judgment, the consequential order under S. 423 (1) (*d*), in the circumstances, is to direct a mere re-hearing.

K. Kuppuswami for Petitioners.

The Public Prosecutor for the Crown.

S. V. V.

Lakshmana Rao, J. C. R. P. No. 1551 of 1929.
17th February, 1933.

Civil Procedure Code (V of 1908), O. 33, Rr. 7 and 15—Application to sue in forma pauperis*—Prior application dismissed summarily for failure to comply with the order of Court—Whether operates as a bar.*

Where a prior application for leave to sue *in forma pauperis* filed by the wife of a Mohamedan who was alleged to be of unsound mind as his next friend was dismissed after notice to the respondent-defendant and after hearing the vakils on both sides but without taking any evidence, for default of the petitioner to produce a medical certificate from the District Medical Officer, which the Court required for satisfying itself that the husband was of unsound mind and that the wife might bring the suit as his next friend and subsequently another application was filed by the wife on behalf of her husband, to the entertainment of which the dismissal of the prior application was pleaded as a bar,

Held, the dismissal of the prior application was only a summary dismissal and did not operate as a bar to the entertainment of the second application.

I. L. R. 50 Mad. 63 followed.

T. S. Vaidyanatha Aiyar for Petitioner.

Watrap S. Subrahmania Aiyar for Respondent.

K. C.

Ramesam and Cornish, JJ. A. S. No. 299 of 1926.
1st February, 1933.

Principal and surety—Time to creditor—What it means—Surety when discharged.

A surety is discharged if, without his assent, the creditor binds himself by agreement with the principal debtor to give him time. And, with reference to the discharge of a surety, giving time means putting it out of the power of the creditor to sue the debtor during the extended time.

3 M. & G. 258 and (1899) 2 K. B. 256 relied on.

K. Rajah Aiyar, V. Ramaswami Aiyar and *R. Seturama Sastri* for Appellant.

S. T. Srinivasagopalachariar, S. Parthasarathy and *V. K. Tiruvenkatachari* for Respondents.

S. V. V.

The Chief Justice and Bardswell, J. C. R. P. No. 1055 of 1928.
21st February, 1933.

Limitation Act (IX of 1908), Ss. 19 and 21—Wife of a lunatic—De facto *manager of husband's properties—Whether competent to acknowledge debt of her husband to third party.*

The wife of an insane person who was in *de facto* management of his affairs and had applied but not been appointed under the Indian Lunacy Act as his guardian and manager, was not competent to acknowledge a debt due by her husband in favour of a third party and was not therefore "an agent duly authorised on his behalf" within the meaning of S. 19 of the Indian Limitation Act nor "a lawful guardian, committee or manager" within the meaning of S. 21 of the said Act.

108 I. C. 529 (Mad.) followed.

24 M. L. J. 428 not followed.

G. Ramakrishna Aiyar for Petitioner.

S. Ramaswami Aiyar for Respondent.

K. C.

Sundaram Chetty, J. C. R. P. No. 14 of 1932.
24th February, 1933.

Court-Fees Act (VII of 1870 as amended in Madras), Art. 17-B of Sch. II—Suit for partition—Prior division in status—Plaintiff in joint possession—Suit incapable of valuation—Rendition of accounts should be valued under S. 7 (iv) (f).

In a suit for partition where the trend of the plaint is that though severance in status was effected there was no actual division

by metes and bounds but, on the other hand, the plaintiffs and defendants were in joint possession, the suit is for division and separate possession of the plaintiffs' share as against the other tenants-in-common and the claim falls under Art. 17-B of Sch. II of the Court-Fees Act.

64 M. L. J. 24 followed.

The additional prayer for rendition of accounts of the movables and jewels will fall under S. 7 (*iv*) (*f*).

T. M. Krishnaswami Aiyar and *A. Nagaswami Aiyar* for Petitioner.

B. Sitarama Rao and *T. Krishna Rao* for Respondents.

K. C.

Curgenven and Sundaram Chetty, JJ. A. S. No. 223 of 1926.
6th March, 1933.

Mortgage—Usufructuary mortgagee—Right of sale—Need for express covenant—Construction of covenant in deed of mortgage.

An usufructuary mortgagee as such has no right to institute a suit for sale of the mortgaged property but must only continue to enjoy the same till redemption. But if in the mortgage deed there is a personal covenant to pay the money a suit for sale may be instituted. Any such covenant, however, should be clear and unconditional in the undertaking to pay. Where a deed of usufructuary mortgage provided for the payment of a portion of the principal money and the interest out of the income of the property and further provided that in respect of the balance the mortgagors were liable to pay after the final taking of accounts on the responsibility of the mortgaged property,

Held, that there was no personal covenant to pay the balance of the mortgage money so as to sustain a suit for sale of the property in realising the same.

39 Mad. 1010 and 1918 M. W. N. 672 referred to.

B. Sitarama Rao and *K. P. Sarvothama Rao* for Appellant.

K. Y. Adiga and *K. Srinivasa Rao* for Respondents.

B. V. V.

Pakenham Walsh, J. C. M. S. A. No. 157 of 1929.
6th March, 1933.

Hindu Law—Joint family property—Throwing into common stock —Proof of intention—Admission made in deed—Effect.

Where property inherited from a maternal grandfather was allowed by a Hindu son to be managed by his father along with the other family properties and in a deed of mortgage executed by the father and son the property inherited by the son was offered as security along with other ancestral lands and the son therein made an admission that the said property belonged to him and his father as of right,

Held, that the son could under those circumstances be taken to have thrown his separate property into the common stock of the family properties.

29 All. 184 referred to.

K. Kameswara Rao for Appellant.

K. Ramamurthi for Respondent.

B. V. V.

Curgenven and Sundaram Chetty, JJ. A. S. No. 124 of 1927.
7th March, 1933.

Mortgage—Usufructuary mortgagee—Deposit of prior mortgage amount—Withdrawal of amount before redemption—Interest set off against gross profits—Usufructuary mortgagee not obtaining possession—Claim for compensation—Transfer of Property Act (IV of 1882), Ss. 67, 68, 76 and 83.

A third usufructuary mortgagee made a valid deposit of the mortgage money under S. 83 of the Transfer of Property Act and on the second usufructuary mortgagee improperly refusing to take it sued him for redemption. He however withdrew the deposit amount from Court and spent it and was unable to re-deposit the amount.

Held, on the question of mesne profits, that the plaintiff was entitled to the gross profits against the second mortgagee under S. 76 (*i*), Transfer of Property Act, but was liable to pay some reasonable interest for his having had the use of the money; such interest however might be set off against the gross profits payable to him.

A prior usufructuary mortgagee resisting redemption can claim to add only such amounts to the redemption money as he could insist on if he had brought a suit for sale under Ss. 67 and 68 of the Transfer of Property Act.

Where a second mortgagee holding for a term of fifteen years did not get possession for a period of two years by reason of his own default in not tendering or depositing the mortgage money to the first mortgagee from whom he was asked to obtain possession,

N. R. C.

Held, that he could not claim compensation for not being put in possession of the property or claim to add it to the redemption money; nor could the term of the mortgage be extended by the period for which he was out of possession so as to make it run from the date he got possession.

K. S. Sankara Aiyar for Appellant.

B. Sitarama Rao and *S. R. Muthuswami Aiyar* for Respondent.

B. V. V.

Burn, J. Cr. R. C. No. 742 of 1932.
9th March, 1933.

Criminal Procedure Code (V of 1898), Ss. 145 and 146—Possession proceeding—Appointment of receiver—Order when can be made.

A Magistrate has no jurisdiction to appoint a receiver in a proceeding under S. 145, Criminal Procedure Code. A receiver can be appointed in possession proceedings only after a final order attaching the disputed property is made under S. 146 of the Code.

T. V. Ramanatha Aiyar for Petitioner.

K. G. Srinivasa Aiyar for Respondents.

The Public Prosecutor (L. H. Bewes) on behalf of the Crown.

B. V. V.

Pakenham Walsh, J. C. M. S. A. No. 130 of 1929.
13th March, 1933.

Civil Procedure Code (V of 1908), S. 47 and O. 21, R. 100—Mortgage suit—Puisne mortgagee impleaded—Plaintiff obtaining decree and purchasing property—Puisne encumbrancer pleading paramount title in execution—Sustainability.

Where in a mortgage suit a puisne encumbrancer was impleaded as party and the plaintiff having obtained a decree brought the property to sale and himself purchased it and the puisne encumbrancer subsequently applied under S. 47 and O. 21, R. 100, Civil Procedure Code, seeking to obtain re-delivery of possession of the property by virtue of a paramount title vested in him,

Held, that the plea of paramount title could not be raised in the execution proceeding at the instance of a person who was a party to the mortgage decree. S. 47 of the Code refers to proceedings in execution based on the decree and does not apply to a case where the judgment-debtor seeks to alter the effect of the decree.

32 Cal. 265 relied on.

S. Nagaraja Aiyar and *J. R. Alwar Naidu* for Appellant.

K. V. Srinivasa Aiyar for Respondent.

B. V. V.

Ramesam and Cornish, JJ. A. S. No. 80 of 1931.
1st March, 1933.

Registration Act (XVI of 1908), S. 23—"Claiming under"—Adopted son by an authority to adopt—Widow if estopped from disputing the adoption—Notes of evidence before Sub-Registrar—Admissibility of in evidence.

Per *Ramesam, J.*—An adopted son is a person claiming under the power to adopt within the meaning of the Registration Act. As the effect of re-registration of a power to adopt is to date back to the original registration, an adoption made prior to the re-registration but after the first registration is valid from the beginning and there is no need to have recourse to a fresh adoption. The widow who made an adoption under a power to adopt put forward by her is estopped from denying the existence of the power and questioning the validity of the adoption.

The statements of attesting witnesses to a document made before the Sub-Registrar in the course of registration are admissible in evidence when the attestors are dead, under S. 32 (7) and S. 158 of the Evidence Act though not under S. 33 of the Evidence Act. Under S. 23, Registration Act, the original presentation for registration and the subsequent one for re-registration need not be in the same capacity.

"Not duly empowered" in S. 23 means "not entitled to present" and should not be restricted to cases of defective representation by persons entitled to present.

Per *Cornish, J.*—The summary of evidence noted by the Registrar is admissible in evidence under S. 35, Evidence Act.

Obiter.—Adoptive son in S. 60 of the Registration Act is the adopted son.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* with *H. Suryanarayana* for Appellants.

The Advocate-General (Sir A. Krishnaswami Aiyar), B. Satyanarayana, K. Bimasankaran and *S. Venkatachalam Pillai* for Respondents.

S. V. V.

Ramesam and Cornish, JJ. A. S. No. 326 of 1927.
9th March, 1933.

Acknowledgment—Admission of execution before Sub-Registrar—If amounts to—Age of defendant given in the plaint—Mere denial of its correctness in the written statement—If enough.

N. R. C.

Where the plaint gives the age of certain defendants in the plaint to show that they were minors at the time of the acknowledgment in question, and the written statement, without giving the correct age according to the defendants, merely states that the defendants were majors at the time, it may indirectly involve denial of the correctness of the age in the plaint, but will not do as an adequate pleading.

The admission of execution before a Sub-Registrar within four months of the execution of the document is to make the document operative and shows that the man is anxious to admit his liability under the document. It is not merely the execution that he hereby admits but admits also the contents of the document and thereby the liability on it.

Case-law discussed.

K. Kuppuswami for Appellant.

M. Patanjali Sastri for Respondent.

S. V. V.

The Chief Justice and Bardswell, J. C. R. P. No. 1260 of 1932.
14th March, 1933.

Civil Procedure Code (V of 1908), S. 115—Court-fees—Order in favour of plaintiff—Revision to High Court—Maintainability—Right of Government to prefer revision—Government of India Act, S. 107.

Where an order in regard to Court-fees happens to be in favour of the plaintiff the High Court will not interfere by way of revision either under S. 115, Civil Procedure Code, or under S. 107, Government of India Act. The fact that the petitioner is the Government and not the defendant does not alter the position.

56 M. L. J. 302, 56 M. L. J. 394 and 29 C. W. N. 627 followed.

Quaere: Whether the Government not being a party to a suit can prefer a revision to the High Court against an order as to Court-fee made in the suit.

The Government Pleader (P. Venkataramana Rao) for Petitioner.

R. Kuppuswami Aiyar for Respondent.

B. V. V.

Lakshmana Rao, J. C. R. P. No. 88 of 1930.
23rd March, 1933.

Limitation Act (IX of 1908), Ss. 19 and 20—Decree—Absence of provision for interest—Payment as for interest—Receipt—If saves limitation.

A decree was silent as to payment of interest. But the judgment-debtor was alleged to have passed a receipt as having paid Rs. 2 towards interest.

Held, the receipt will be an acknowledgment within the meaning of S. 19 of Limitation Act and even otherwise payment of interest operates as an admission of an existing debt which is due.

K. S. Desikan for Petitioner.

G. S. Venkatraman for *G. Gopalaswami* for Respondent.

S. V. V.

Anantakrishna Aiyar, J. C. R. P. No. 1004 of 1928.
24th March, 1933.

Civil Procedure Code (V of 1908), O. 21, R. 2—Statement of adjustment in execution petition—Adjustment not certified—If can be relied upon.

O. 21, R. 2 does not bar an enquiry into an uncertified adjustment when the same is referred to by the decree-holder himself in his execution petition and the judgment-debtor only wants to rely upon it in defence.

30 L. W. 526 followed.

R. Sundaralingam and *K. Raghavachari* for Petitioner.

K. S. Desikan for Respondent.

S. V. V.

Cornish, J. C. R. P. No. 291 of 1930.
24th March, 1933.

Civil Procedure Code (V of 1908), O. 33, R. 1 proviso—Suit for redemption—Leave to sue in forma pauperis*—If value of equity of redemption to be taken into consideration.*

Where the plaintiff applied to sue as a pauper in a suit to redeem a mortgage,

Held, the equity of redemption is the subject-matter of the suit, and its value must not be taken into consideration in deciding the question whether the plaintiff is entitled to sue as a pauper.

33 All. 237 distinguished.

20 M. L. J. 121 relied on.

T. R. Gundappa Rao for Petitioner.

A. Srirangachari for Respondent.

K. C.

N. R. C.

Pandalai, J. S. A. No. 493 of 1930.
28th March, 1933.

Construction—Deed by a Sudra—" Santhathi" if includes illegitimate sons—Heritable estate.

In a settlement deed executed by a Sudra in favour of his son, the words were " I have made a settlement of the undermentioned properties to you. You shall enjoy the income thereof during your lifetime and after your death your male santhathi or adopted santhathi shall take (it). Even if there should be no male santhathi but only female santhathi, such female santhathi shall take. During your lifetime you have no right whatever to sell or mortgage the above properties ".

Held, that the words conferred a heritable estate on the son, that the words " settlement " is used as equivalent to " gift," and that there were no words in the deed taking away the heritable estate conferred above.

33 Cal. 23 (P. C.) followed.

The questions raised in the Court below, viz., whether the term " Santhathi " would include illegitimate children when used in a deed executed by a Sudra and whether the principles of 55 Mad. 1 (P. C.) would apply discussed but left open.

S. T. Srinivasagopalachariar and *T. D. Srinivasa Chariar* for Appellant.

C. Padmanabha Aiyangar and *T. E. Ramabhadra Chariar* for Respondent.

S. V. V.

Madhavan Nair and Jackson, JJ. Appeal No. 314 of 1927.
29th March, 1933.

Transfer of Property Act (IV of 1882), S. 101—Mortgagee purchaser—Money decree—Execution of—Sale in execution of mortgaged properties—Claim petition by mortgagee purchaser—Dismissal of—Failure to file a suit within one year—Effect of—Mortgage if revives—Proclamation subject to a mortgage—No enquiry into mortgage—Purchaser—If can question the mortgage.

Where a mortgagee purchases a part of the mortgaged properties in consideration of the mortgage amount and where there are no mesne encumbrances, the mortgage is extinguished under S. 101 of the Transfer of Property Act and it cannot be revived by reason of the fact that in proceedings for sale of the mortgaged properties in execution of a simple money decree against the mortgagor, a claim petition put in by the mortgagee-purchaser on the strength of his sale deed is dismissed as too late and the claim order is allowed to become conclusive, no suit being brought within a year to set aside the claim order.

39 All. 178 (P. C.) and 52 Mad. 465 distinguished.

Where a sale proclamation under O. 21, R. 66, Civil Procedure Code, recites that the properties put up for sale are subject to a mortgage but where there is no enquiry into the subsisting nature of the mortgage or any order of Court to have the properties sold subject to the mortgage under O. 21, R. 62, Civil Procedure Code, what is put up for sale is not merely the equity of redemption and the auction-purchaser is not estopped from questioning the mortgage.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *B. Jagannadha Doss* for Appellant.

C. S. Venkatachariar and *K. R. Rama Aiyar* for Respondent.

S. V. V.

Pakenham Walsh, J. S. A. No. 201 of 1929.
30th March, 1933.

Madras Abkari Act (*I of 1886*), *S. 28—Default of abkari contractor—Sale of immovable property—Bidder failing to make deposit—Re-sale of property—Liability of bidder for loss—Omission of selling officer to disclose encumbrance—Effect—Rule of* Caveat emptor—*Applicability—Madras Revenue Recovery Act* (*II of 1864*), *Ss. 36, 37 and 38.*

Where the Government put up for sale the house of an abkari contractor who had committed default and the defendant knocked down the property at the auction for a certain price but did not deposit the necessary amount and thereupon the Government re-sold the property and sued the defendant for the loss caused by the re-sale but the latter pleaded that the prior sale was vitiated by the fraud of the selling officers in having told him that there was no encumbrance while the property was really encumbered,

Held, that the Government could recover from the bidder the difference between the bid at the first sale and the price fetched at the re-sale with any encumbrance amounts due at the time of the re-sale added to the latter figure.

Applicability of the rule of *Caveat emptor* discussed.

16 Cal. 535, 25 Cal. 99 and 41 Mad. 474 referred to.

T. R. Venkatarama Sastri and *M. S. Vaidyanatha Aiyar* for Appellant.

The Government Pleader (*P. Venkataramana Rao*) for Respondent.

B. V. V.

Curgenven and Sundaram Chetty, JJ. A. S. No. 403 of 1930.
31st March, 1933.

Mortgage — Subrogation — Partition deed — Allocation of liability in respect of debt—Indemnity clause—Covenant running with land—Liability of purchaser with notice—Award of interest by way of damages—Transfer of Property Act (IV of 1882), S. 40.

Subrogation can be claimed by a purchaser whose money is applied for the purpose of paying off a mortgage decree though the hand that deposited it in Court is that of the vendor who was himself the mortgagor and not that of the purchaser. Though the payment is only a partial payment of the decree still if by reason of it, the mortgage decree is wiped out and no balance is left subrogation can be claimed.

11 Mad. 343, 38 Mad. 548 and 55 M. L. J. 369 referred to.

A later purchaser or mortgagee who undertakes to discharge two prior encumbrances but pays only one cannot resist the claim of the unpaid encumbrancer by setting up the discharge of the other encumbrance as a shield or claim priority for the amount paid in discharge.

6 C. L. J. 134 referred to.

Where in a deed of partition between brothers it was agreed that each should discharge specified portions of a mortgage decree binding on all of them and that if any one was obliged to pay more than his share, the other shares were liable for the loss,

Held, (1) that the stipulation was in the nature of a restrictive covenant annexed to the ownership of the property and could be enforced under S. 40, Transfer of Property Act, against a purchaser of the property with notice;

41 All. 417 and 8 Ir. Eq. 526 relied on.

(2) that such a purchaser could not claim any priority or right of subrogation in respect of the amounts paid by him towards the discharge of the mortgage decree;

53 Mad. 188 referred to.

and (3) that interest by way of damages could be decreed under the covenant in order to indemnify the party who paid the amount for the actual loss suffered by him.

15 Ch. D. 400 referred to.

C. S. Venkatachari for Appellant.

B. Sitarama Rao, C. A. Seshagiri Sastri and *S. R. Muthuswami Aiyar* for Respondents.

B. V. V.

Sundaram Chetty, J. C. R. P. No. 1359 of 1932.
31st March, 1933.

Civil Procedure Code (V of 1908), O. 21, R. 90—Application under—Undischarged insolvent—Locus standi *to apply.*

Where the properties of the judgment-debtor who had been adjudicated an insolvent had been sold in execution of a mortgage decree against him without impleading the Official Receiver as a party to the proceedings and the judgment-debtor (insolvent) applied to set aside the execution sale under O. 21, R. 90, Civil Procedure Code,

Held, in revision, that he had a *locus standi* to maintain the application, especially as the Official Receiver was not made a party to the execution proceedings and that he was a person whose interests were "affected by the sale" within the meaning of the rule.

13 L. W. 616 and A. I. R. 1926 Mad. 959 followed.

49 Mad. 461 (F. B.) distinguished.

R. Rajagopala Aiyangar for Petitioner.

K. S. Rajagopala Aiyangar, R. V. Raghava Thathachariar and *R. Srinivasan* for Respondents.

S. V. V.

Cornish, J. C. R. P. No. 463 of 1930.
7th April, 1933.

Contract—Sale of land—Payment of 'bayana' *by vendee—Default of vendee to perform contract—Advance if forfeited.*

Where under a contract for the sale of certain immovable property the vendee paid a certain sum of money as '*bayana*' to the vendor but the vendee failed to perform his part of the contract within a reasonable time and thereupon the vendor conveyed the property to a third person and performance of the original contract was consequently frustrated,

Held, that what was paid by the vendee as '*bayana*' was earnest money, that it was forfeited owing to his default and he was therefore not entitled to recover the same.

Howe v. *Smith*, (1884) 27 Ch. D. 89 at 101 and 50 M. L. J. 629 (P. C.) referred to.

A. Lakshmayya for Petitioner.

P. Panini Rao for Respondent.

B. V. V.

N R C

The Chief Justice, C. R. P. No. 1331 of 1930.
Bardswell and Burn, JJ.
12th April, 1933.

Criminal Procedure Code (V of 1898 as amended), S. 476-B—Appeal in civil proceeding—Power of High Court to remand case for further inquiry.

In an appeal under S. 476-B, Criminal Procedure Code, in respect of a civil proceeding the appellate court has the power to remand the case to the lower court for further inquiry.

Case-law discussed.

Ch. Raghava Rao for Petitioner.

P. Satyanarayana Rao for Respondents.

B. V. V.

Curgenven, J. C. R. P. No. 1256 of 1930.
12th April, 1933.

Civil Procedure Code (V of 1908), Sch. II, para. 14—Partition suit—Reference to arbitration—Division of properties incomplete—No application objecting to award by aggrieved party before decree—Decree by Court in terms of award—Whether High Court can interfere in revision.

Where a decree had been made by Court in terms of an award between parties to a suit for partition of joint family properties and one of the parties afterwards complained of the award having been incomplete regarding the division of certain items, on the question whether the High Court could interfere in revision under S. 115, Civil Procedure Code,

Held, that if the petitioners desired to take exception to the award on the score of its incompleteness, they had an opportunity to do so before the decree was passed. They should take the award with all its defects, now that the opportunity afforded them to object to it had gone by. The mere circumstance that the petitioners might have put themselves into an awkward situation would not give the Court jurisdiction and power to extricate them, which it did not otherwise possess.

29 Cal. 167 and 38 Mad. 256 followed.

19 I. C. 405 referred to.

M. Patanjali Sastri for Petitioner.

T. M. Krishnaswami Aiyar and *T. D. Srinivasachariar* for Respondents.

K. C.

Krishnan Pandalai, J. S. A. No. 388 of 1929.
10th April, 1933.

Contract Act (IX of 1872), S. 63—Scope—Suit on a pro-note —Defendant's plea that plaintiff agreed to take a lesser sum and remit balance of debt—Whether such agreement valid and binding.

Where the plaintiff instituted a suit for Rs. 4,000 on the basis of a promissory note and the defendant pleaded that the plaintiff agreed to take Rs. 1,830 and remit the balance of the debt in view of the fact that other creditors of the defendant consented to take lesser amounts,

Held, that an agreement to take lesser amount and remit the balance is valid under S. 63 of the Contract Act.

6 Rang. 191 dissented from.

53 Mad. 127: A. I. R. 1929 Mad. 794 doubted and distinguished as a case of a mortgage.

55 M. L. J. 1 (P. C.) relied on.

B. Somayya and *A. Lakshmayya* for Appellant.

Ch. Raghava Rao and *M. Sriramamurthi* for Respondents.

S. V. V.

Madhavan Nair, Jackson and Lakshmana Rao, JJ. A. S. No. 574 of 1931.
11th April, 1933.

Hindu Religious Endowments Act (1927), S. 84—Petition to District Judge against order of the Board—Appeal to High Court, if competent.

Where the Endowments Board declared a temple to be a non-excepted temple under S. 84 (1) and an application was preferred to the District Court to modify the order under S. 84 (2), the order of the District Judge on that application is not appealable as a decree, inasmuch as the order is passed on an *application* and not in a *suit.*

V. V. Srinivasa Aiyangar and *K. Sankara Sastri* for Appellant.

P. Venkataramana Rao (Ag. Advocate-General) for Endowments Board.

B. Govindan, R. Sundaralingam and *S. G. Rangaramanujam* for other Respondents.

S. V. V.

N. R. C.

Curgenven and Sundaram Chetty, JJ. A. S. No. 299 of 1927.
11th April, 1933.

Evidence Act (I of 1872), S. 92—Agreement for sale—Collateral oral covenant—Vendee to be permitted to sell to others and to discharge debts of vendor and pay over balance remaining—Later agreement between the same parties to discharge the claims under the earlier agreement—Admissibility of the former oral agreement in evidence—Even in case of non-admissibility of earlier agreement, whether it can still form good consideration for the later agreement.

The appellant sued the respondent for the recovery of a certain sum of money on the ground that the appellant sold her properties to the respondent by a registered sale deed with a collateral oral agreement that he (respondent) might in his turn sell them to others and after discharging certain debts due by her, pay over to her any balance left. The respondent sold the properties in his turn to others and the appellant alleged that the suit amount represented the balance so left after discharging debts. Subsequently there was a litigation to which the appellant, the respondent, the vendees from the respondent and others were all parties. The respondent wanted the appellant's help in that matter to support his vendees. The appellant alleged that there was an agreement as a result of a mediation, that the respondent should pay appellant a sum of Rs. 4,000 in discharge of her claims on the earlier agreement. The suit was based alternately on both the agreements. The trial Court held that the oral agreement was inadmissible in evidence under S. 92 of the Evidence Act in the face of the sale deed by the appellant to the respondent and the agreement being inadmissible in evidence could not form good consideration for the later agreement.

Held, that the oral agreement, though not admissible in evidence, could form good consideration for the later agreement. The test was what had been in the minds of parties at the time. If the claim was made *bona fide* and the later agreement was entered into to discharge that claim the legal validity or invalidity of the claim was beside the point.

1918 A. C. 869 at 873, 32 Ch. D. 266, L. R. 5 Q. B. 449 and 31 Mad. 474 followed.

K. Bhashyam Aiyangar, T. R. Srinivasan and *R. Desikan* for Appellant.

N. S. Srinivasa Aiyar for Respondent.

K. C.

Krishnan Pandalai, J. S. A. No. 215 of 1929.
19th April, 1933.

Will—Properties set apart for charities—"Family heirs" mentioned, who were to be in management of the trust—Minor heir suing senior in management for partition and possession of his half share in management and for accounts—Construction of document—Dedication to trust and not charged merely with charity—Minor heir's right to sue—Whether such a suit falls within S. 92 of the Civil Procedure Code.

A will of a Hindu testator appointed certain persons as his " family heirs " and directed the performance by them of certain public charities out of those properties set apart by the testator and maintenance of the said " family heirs " were to be met from the surplus and that the balance, if any, ought to be constituted into a fund for the purchase of additional properties for the charity. The plaintiff, a minor heir, sued the senior heir in management for partition and possession of one-half of the suit properties and for accounts on the footing that he had a beneficial interest in the properties.

Held, (1) that a proper construction of the will would read that the properties were dedicated to the charitable trust and not merely burdened with the performance of the charity;

(2) that the plaintiff was entitled to enforce his right of management of the trust and for separate possession of the property in this suit for partition;

(3) that the rights of a plaintiff to be himself a trustee or to a share in the management of a trust were all individual rights, the enforcement of which fell outside the scope of S. 92, Civil Procedure Code.

54 Mad. 1011, 45 Mad. 113 and A. I. R. 1927 Mad. 820 followed.

B. Sitarama Rao and *M. S. Lakshminarasa Aiyar* for Appellant.

K. Sankara Sastri and *V. Ratnam* for Respondents.

K. C.

Madhavan Nair and Jackson, JJ. A. S. No. 35 of 1928.
25th April, 1933.

Hindu Law—Adoption—Daughter's consent if necessary—Selection from " agnates or sagotrajas "—Not too general a consent—Nearest sapinda's consent capriciously withheld—If obligatory to consult next nearer sapindas—Family council if should be summoned.

N. R. C.

A Hindu widow adopted her husband's uterine brother's son without consulting a step-daughter who had also sons living. The father of the adopted boy was also one of the nearest sapindas of the husband. There was another equally near sapinda who had been applied to for his consent but had refused successive registered letters and given no reasons for or against the adoption. There were two sapindas of the next degree and two more in a degree further remote. Of these the first two had not been consulted but the other two had taken part in the adoption ceremony and attested the adoption deed. The natural father had given a formal deed of permission authorising the widow to adopt a boy either " from agnates or sagotrajas ". On a suit by the step-daughter impeaching the validity of the adoption,

Held, that (1) the consent was to choose from a class " either agnates or sagotrajas " and was therefore not too general to be bad. 26 Mad. 681 distinguished.

(2) The daughter need not be consulted in the circumstances. 43 Mad. 876 is still good law. 20 L. W. 503 and 49 Mad. 652 discussed and distinguished.

(3) The refusal of the registered letters knowing their contents was a capricious refusal of permission to adopt.

(4) It is no doubt obligatory on the part of the widow to consult the nearest sapindas; but if their consent is capriciously withheld, it is not necessary that a family council should be held to consider the propriety of the adoption, or that the reversioners should be consulted in the order of their degree of relationship to the deceased husband, or that even all the reversioners should be consulted. It is not necessary that each and every reversioner should be consulted or that if one or two are omitted from consultation the adoption is invalid. The reason for assent is, as given in 12 M. I. A. 397, 1 Mad. 174 and 43 Mad. 650, to see if it was not done by capricious motives by the widow.

S. Varadachariar for *K. Kameswara Rao* for Appellant.

P. Somasundaram for Respondent.

S. V. V.

Madhavan Nair and Jackson, JJ. A. S. No. 426 of 1927.
25th April, 1933.

Contract—Agreement to receive lesser sum in satisfaction—How far can be proved—Contract Act, S. 63—Evidence Act, S. 92.

If *A* lends *B* Rs. 1,000 at 10 per cent. reducing these terms to the form of a document and at the end of the year *B* can pay only Rs. 50 by way of interest, then *A* can if he likes take Rs. 50 as in full settlement of interest up to date and that can be proved by *B*.

But the parties may agree that the rate is changed to 5 per cent. but then that cannot be proved by *B* unless the alteration is committed to writing. *Cf.* 54 Mad. 829.

T. M. Krishnaswami Aiyar for Appellant.

S. Ranganatha Aiyar and *K. S. Venkatrama Aiyar* for Respondents.

S. V. V.

Krishnan Pandalai, J. C. M. S. A. No. 149 of 1930.
25th April, 1933.

Civil Procedure Code (V of 1908), O. 21, R. 11—Indian Limitation Act, S. 182, cl. (5).

Where an Execution Petition was filed against a minor judgment-debtor represented by his guardian who had been dead prior to the Execution Petition,

Held, that notwithstanding the representation of the minor by a dead guardian it was an application in accordance with law, and constituted a step-in-aid of execution.

A. I. R. 1931 Lah. 636 and 4 Pat. L. T. 54 approved and followed.

17 Mad. 76 referred to.

Kasturi Seshagiri Rao for Appellant.

V. Govindarajachari for Respondent.

K. C.

Walsh, J. S. A. No. 1261 of 1928.
26th April, 1933.

Transfer of Property Act (IV of 1882), S. 52—Mortgage to a Co-operative Rural Credit Society—Proceedings by Society before Assistant Registrar—Award passed by Registrar directing sale of mortgaged properties—Filing of award in Civil Court having jurisdiction over properties—Sale by mortgagor to a third person after execution proceedings by the Society were started—Purchaser in private sale not made a party to the execution proceedings by Society—Sale and purchase by Society of properties brought to sale in execution—Purchaser in private sale suing for redemption of mortgage—Lis pendens—*Assistant Registrar, whether a Court—Co-operative Societies Act (II of 1912)—Rules under—Civil Procedure Code, S. 141—"Proceedings" meaning different from the same word occurring in S. 52 of the Transfer of Property Act—Powers of Registrar to pass a mortgage decree—Effect of.*

After certain properties were mortgaged to a Co-operative Rural Credit Society, the Society took proceedings before the Assistant Registrar of Co-operative Societies who passed an award

directing the sale of the properties for the amount due under the mortgage. The Society then filed an award in the Court having jurisdiction over the properties for executing the decree. After execution proceedings were started, the mortgagors sold the properties to another person, who was not made a party to execution proceedings. Ignoring the execution proceedings which culminated in the sale of the properties by the Society and purchase by itself, the purchaser in private sale instituted a suit to redeem the mortgage. It was contended for the Society that the sale by the mortgagors was affected by *lis pendens* under S. 52 of the Transfer of Property Act and the execution proceedings were final.

Held, (*a*) the Assistant Registrar of Co-operative Societies is a Court and the proceedings before him under R. 14 of the Rules framed under the Co-operative Societies Act are proceedings before the Court within S. 52 of the Transfer of Property Act.

59 M. L. J. 229, 45 Cal. 585, 24 Mad. 121, 36 Mad. 72 at 89 and 47 All. 374 at 376 considered and relied on.

37 Mad. 107, 15 I. C. 652 (F. B.), A. I. R. 1932 Mad. 350 at 403 (F. B.), 30 Mad. 326 and 50 Mad. 121 at 124 distinguished.

(*b*) The meaning of the term "proceedings" in S. 141, Civil Procedure Code, is different from the meaning of the same term in S. 52, Transfer of Property Act.

(*c*) Though S. 52, T. P. Act, may not in terms apply, its principle should be applied.

(*d*) Lis can start even after decree in certain cases. *See* 39 C. W. N. 366 and 31 M. L. J. 839.

(*e*) The award when put into Civil Court for execution has all the force of a decree passed by the Civil Court.

4 Bom. 34, 27 C. W. N. 666, 46 Bom. 128 and A. I. R. 1926 Lah. 547 followed.

40 Cal. 219 and 64 M. L. J. 341 (P. C.) distinguished.

Quaere. Whether the Registrar of Co-operative Societies can pass a mortgage decree.

(*f*) Even if the Registrar has no power to pass such a decree the remedy of the aggrieved party is by way of a suit to set aside the award and the executing Court has no jurisdiction to go behind the decree and consider its validity.

Leave to appeal granted.

T. L. Venkatarama Aiyar for Appellant.

K. Bhashyam Aiyangar, B. R. Chakravarthi and *T. R. Srinivasan* for Respondents.

K. C.

Krishnan Pandalai, J. C. M. S. A. No. 156 of 1930.
26th April, 1933.

Limitation Act (IX of 1908), Art. 181 — Preliminary decree on mortgage—Subsequent final decree—Appeal by mortgagor as well as second appeal—Decree in favour of mortgagee affirmed —After decision of second appeal legal representative of mortgagee decree-holder applying for a fresh final decree—Period of limitation for such an application—Application of such a kind, whether lies.

A person obtained a preliminary decree on a mortgage on the 7th December, 1918 and, pending an appeal by the mortgagor, he obtained also a final decree on 28th April, 1919. Meanwhile the appeal was dismissed and subsequently a second appeal to the High Court was also dismissed on the 6th April, 1923. On the 5th March, 1926, the present appellant, who was brought on record as the legal representative of the decree-holder respondent in the second appeal mentioned above, applied for the passing of a fresh final decree on the basis of the decree of the High Court.

Held, even though the decree of the High Court in second appeal was in affirmation of the Lower Court's decree, the decree-holder has the right to apply for a final decree within three years from the date of decree in the second appeal under Art. 181 of the Limitation Act, and the fact that there was already a final decree based on an inconclusive preliminary decree does not affect his right to apply for a final decree on the basis of the appellate Court's decree.

39 All. 641 (F.B.) ; 6 Pat. 24 (P. C.) ; 8 Lah. 253 (P. C.) ; 5 Lah. 257 ; 37 L. W. 557 and 58 M. L. J. 207 referred to.

R. Desikan for Appellant.

T. V. Muthukrishna Aiyar and *R. Vaidyanatha Aiyar* for Respondent.

K. C.

Curgenven and Sundaram Chetty, JJ. A. S. No. 40 of 1928.
27th April, 1933.

Hindu Law—Will—Oral will—Proof of—Consent of sapinda to adoption—Conditional on payment—Validity of—Consent under the impression that husband had authorised—Not enough.

Only the clearest and most cogent proof should be accepted of a nuncupative will.

62 M. L. J. 23 and 12 M. I. A. 1 relied on.

Where plaintiff, a sapinda, made it a condition of granting his consent to an adoption by the widow to her husband that he should

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be given a substantial sum of money, the refusal is from corrupt motives and the widow is justified in acting upon the consent of the agnates next in order.

In order that a consent of sapindas may enable a widow to adopt, it must be an independent consent, given in the exercise of a judgment uninfluenced by extraneous considerations. In particular, if that judgment is affected by a belief that the husband has given an authority to adopt, a consent so procured will not be independent and will not avail to render an adoption made in pursuance of it valid.

30 Mad. 50 (P. C.) and 26 Mad. 627 followed.

K. Kuppuswami for Appellant.

K. Krishnaswami Aiyangar for Respondent.

S. V. V.

Ramesam, J. C. R. P. No. 460 of 1930.
2nd May, 1933.

Madras Village Courts Act (I of 1889), S. 18—Suit on a promissory note in the Village Munsif's Court—Omission to sue for principal and balance of interest—Fresh suit in District Munsif's Court for balance of the claim omitted—Barred.

Where a person sued in a Village Munsif's Court for a portion of the interest due on a promissory note and omitted to sue for the principal and the balance of the interest but afterwards brought a suit in a District Munsif's Court for the balance of his claim,

Held, that the second suit was barred by S. 18 of the Madras Village Courts Act.

29 M. L. J. 474 distinguished and doubted.

S. Ramaswami Aiyar for Petitioner.

E. R. Balakrishnan for Respondent.

K. C.

[END OF VOL. LXIV.]

BAR COUNCIL'S INSTRUCTIONS.

Instructions issued by the Madras Bar Council for the guidance of legal practitioners and embodied in its resolution, dated 2nd April, 1933:—

1. Regular accounts in bound books, *viz.*, a day book and a ledger, should be maintained by every practitioner regarding the daily receipts and disbursements of the moneys of his clients.

2. The fees for each case should be settled at the earliest opportunity and, wherever possible, such settlement should contain

NOTE TO BINDER.

Substitute this for the corresponding pages in 64 M.L.J.

the amount received is capable of allocation or appropriation.

3. Moneys received or drawn from Court by a practitioner on behalf of his client should be paid without delay to the client who should be intimated by post immediately after such receipt and where the client does not turn up, the money should be remitted to the client's address by postal money order. If for any reason the money cannot be so paid or remitted to the client, the same should be invested in the Post Office Savings Bank at the place in the name of the practitioner, provided that, where the amount exceeds the limit prescribed by the postal rules to the investment in the Savings Bank Account, the excess should be invested in any other bank in the locality.

4. Practitioners should avoid arrangements by which clients' moneys in their hands are converted into loans. But in no case should such conversion be made without the previous consent in writing of the client.